

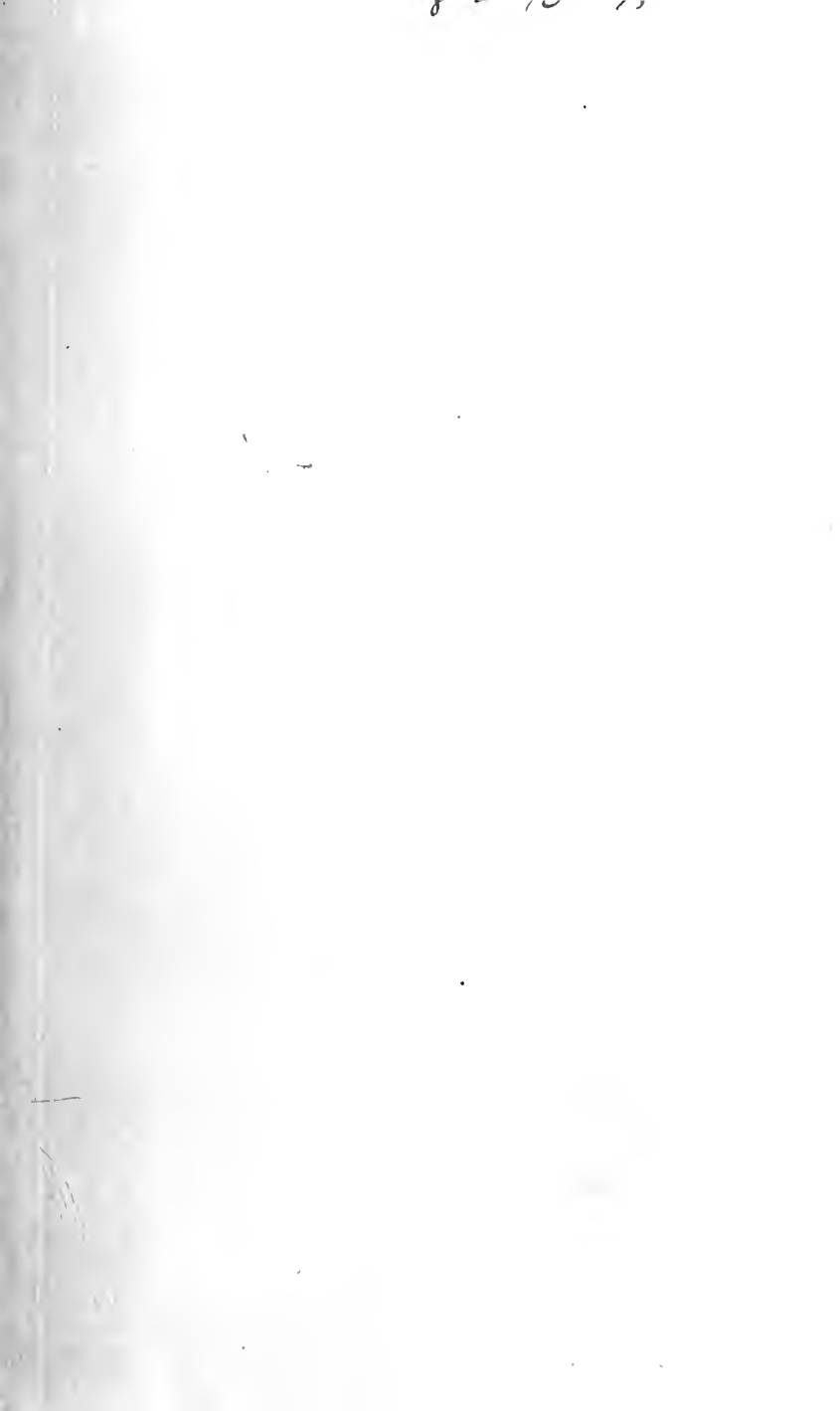
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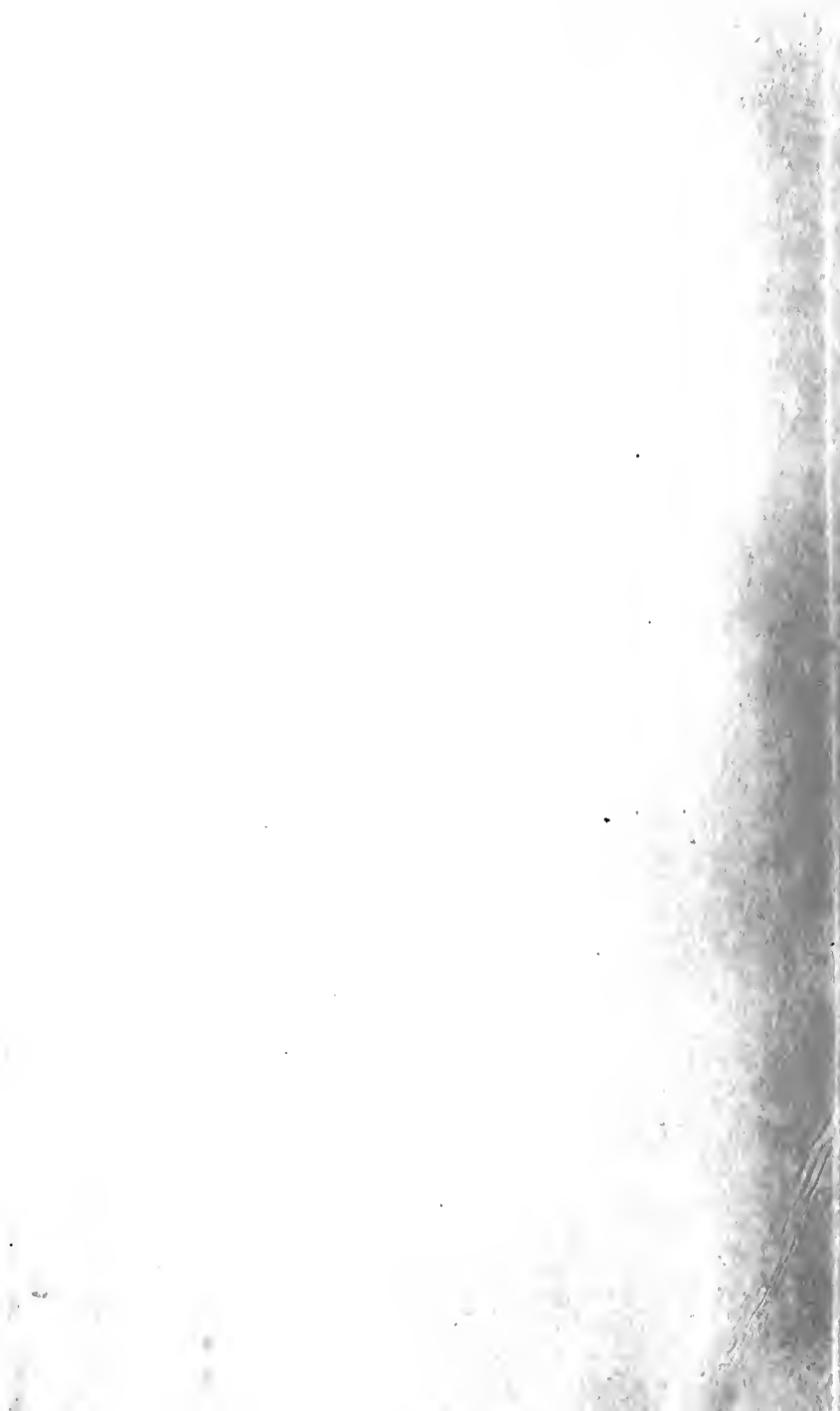
No. 119930

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.





No. 10517

United States
Circuit Court of Appeals

For the Ninth Circuit. *VL*

2354

THE STANDARD ACCIDENT INSURANCE
COMPANY OF DETROIT, MICHIGAN, a
corporation,

Appellant,

vs.

EDNA L. HEATFIELD, ,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Northern Division

FILED

SEP 18 1943

PAUL P. O'BRIEN,
CLERK

No. 10517

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE STANDARD ACCIDENT INSURANCE
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

HARRY M. MOREY,

1015 Paulsen Building, Spokane, Washington
Attorney for Plaintiff, and Appellee

M. E. MACK,

832 Old National Bank Building, Spokane,
Washington
Attorney for Defendant, and Appellant.

In the Superior Court of the State of Washington
In and for the County of Spokane

No. 316

No. 109636

EDNA L. HEATFIELD,

Plaintiff,

vs.

THE STANDARD ACCIDENT INSURANCE
COMPANY OF DETROIT, MICHIGAN, a
corporation,

Defendant.

SUMMONS

The State of Washington, to the said The Standard Accident Insurance Company of Detroit, Michigan, a corporation, Defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of

the day of service, and defend the above entitled action in the court aforesaid, and answer the complaint of plaintiff and serve a copy of your answer on the undersigned attorney for plaintiff at the address below stated; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which will be filed with the clerk of said court, a copy of which is herewith served upon you.

HARRY M. MOREY,

Attorney for Plaintiff.

[Endorsed]: Filed Dec. 10, 1942; Frank C. Nash,
Clerk

[Endorsed] Filed Jan 13 1943, A. A. LaFramboise, Clerk. [1*]

[Title of Superior Court and Cause]

COMPLAINT

Plaintiff complains of defendant and alleges:

I.

That on April 4, 1916, the defendant, a corporation authorized and licensed to do an insurance business in the State of Washington, for valuable consideration paid it by Augustus S. Heatfield, made, executed and delivered to him its certain accident insurance policy or contract number CAC 97R1387, and in consideration of premiums paid it each year, has kept said policy in force and effect and said policy was in force and effect on June 30th, 1942. That

*Page numbering appearing at foot of page of original certified Transcript of Record.

the defendant has a true and correct copy of said contract or policy of insurance.

II.

That said policy of insurance provides in part as follows:

“The Standard Accident Insurance Company of Detroit, Michigan . . . in consideration of the representations contained in the application . . . and of the premiums . . . hereby insures Augustus S. Heatfield . . . against loss from bodily injuries effected directly, exclusively and independently of all other causes through accidental means except when intentionally self inflicted . . . subject to all conditions and limitations herein contained. . . . The principal sum, \$7500 . . . For loss of life principal sum, . . . All indemnities provided in this policy for loss other than that of time on account of disability will be paid within sixty days after receipt of due proof . . . Indemnity for loss of life of the insured is payable to the beneficiary if surviving the insured. [2]

“Copy of application: To whom do you wish policy to be payable in case of death? . . . Edna L. Heatfield, wife.”

III.

That plaintiff, Edna L. Heatfield was on June 30, 1942, the wife of Augustus S. Heatfield.

IV.

That on June 30, 1942, said Augustus S. Heatfield was driving an automobile on a narrow mountain

road between the town of Republic and Colville, Washington. That the driver of an automobile coming from the opposite direction drove same in such a manner as to force said Heatfield to drive his automobile off the road so that the wheels of his car were over and down the bank to such an extent that it was impossible for said Heatfield to gain sufficient traction to get his car back on the road. That the exact time of the event next above mentioned is not known to plaintiff, but it was sometime between four and six o'clock p. m. on said date. That said Augustus S. Heatfield was alone. That the incident next above mentioned happened at an isolated spot so that it was impossible for said Heatfield to get access to a telephone or assistance.

V.

That said Heatfield undertook to get said automobile back on the road and in so doing over-exerted himself and placed an unusual strain upon his heart. That immediately thereafter he became violently ill and that death resulted at sometime between eight p. m. June 30, and 8 a. m. July 1st, 1942, and that the death was proximately and exclusively and independently of all other causes by said over-exertion and strain. That death of the deceased was not intentionally self-inflicted.

VI.

That said policy of insurance further provides as follows:

“D. (4) Written notice of injury on which claim may be based must be given to the company

within twenty days after the date of the accident causing such injury.

“E. (5) Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the Company at Detroit, Michigan, or to any authorized agent of the Company, with particulars sufficient to identify the insured, shall be deemed to be notice to the Company.

Failure to give notice within the time provided [3] ed in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

“F. (6) The Company upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

“G. (7) Affirmative proof of loss must be furnished to the Company at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Company is liable, and in case of claim for any other loss, with-

in ninety days after the date of such loss.

“H. (8) The Company shall have the right and opportunity to examine the person of the insured when and so often as it may reasonable require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.”

VII.

That Lamping & Company, a corporation, with offices in the Colman Building, Seattle, Washington, is and at all times herein mentioned was an authorized agent of the defendant, and that notice was given Lamping & Company of the death of said deceased and that claim would probably be made, and that attached hereto and made a part hereof and marked Exhibit “A” is a copy of said Notice.

That an autopsy on the body of deceased was had on July 10th and that the defendant was present through its physician and surgeon who concurred with the plaintiff in the selection of a pathologist.

That on July 30th, 1942, plaintiff furnished the defendant at his office in Detroit, Michigan with plaintiff’s unverified proof of loss and that attached hereto and made a part hereof and marked plaintiff’s Exhibit “B” is a copy of such proof.

That more than fifteen (15) days elapsed since receipt by defendant of plaintiff’s letter of July 30th, 1942, and no forms having been furnished by defendant for proof of loss required by it, plaintiff made a further sworn proof of loss, and attached hereto and

made a part hereof and marked Exhibit "C" is copy of such proof of loss which was forwarded to [4] Lamping & Company at Seattle, Washington, on August 25, 1942, and copy of which was also forwarded to defendant at its Detroit office.

That more than sixty days have expired since receipt by defendant of plaintiff's proof of loss of August 25, 1942, and *that* the defendant has failed and neglected to pay the indemnity due plaintiff or to advise plaintiff whether indemnity will or will not be paid. That plaintiff has done all things required by the policy of insurance to be done by her.

Wherefore, Plaintiff prays for judgment against defendant in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00) and for interest thereon at the date of six per cent per annum from August 26, 1942, and for all of her costs and disbursements in this cause incurred.

HARRY M. MOREY

Attorney for Plaintiff

1015 Paulsen Building

Spokane, Washington

State of Washington,
County of Spokane—ss.

Edna L. Heatfield, being first duly sworn, deposes and says: That she is the plaintiff in the above entitled action; that she has read the foregoing complaint; is familiar with its contents, and the matters therein stated are true as she verily believes.

EDNA L. HEATFIELD

Subscribed and sworn to before me this 29th day of October, 1942.

HARRY M. MOREY

Notary Public in and for the
State of Washington, residing
at Spokane, Washington [5]

EXHIBIT A

Lamping & Company,
250 Colman Building
Seattle, Washington
Gentlemen:-

July 8, 1942

In re. Augustus S. Heatfield
Standard Accident Policy
#97R1387 Renewal number
706997.

Assured died near Curlew, Washington, on June 30th. I am attorney for the estate. He held an accident policy with the Illinois Commercial Men's Association and the Aetna Life carrying double indemnity. I was employed by the Executor and widow to represent them in the handling of the estate and also in the matter of collecting on the accident policies. That employment was made on July 1st. It was not until today that I learned that Mr. Heatfield had a policy with the Standard Accident Insurance Company as above numbered. Therefore I must advise you that there will probably be a claim made for payment under your accident policy.

The body is being held intact for an autopsy which

I intended to have performed on July 10th, until I knew that he had this policy with you. If you desire to have an autopsy made or to be represented when the autopsy is taken, and if you cannot make arrangements by July 10th, I think we can hold the body for a day or two longer. In any event, this is your notice that you may have an opportunity to have the autopsy if you desire. I wish you would advise me.

Very truly yours,

HARRY M. MOREY

HMM:M [6]

EXHIBIT B

July 30, 1942

Standard Accident Insurance Company

Detroit, Michigan.

Gentlemen:

Re: Accident policy of Augustus S.

Heatfield 97R-1387

I represent Thos. A. Heatfield, executor of the estate of Augustus S. Heatfield and Edna L. Heatfield, his widow.

Augustus S. Heatfield died near Curlew, Washington on June 30, 1942. It seems that he was driving his automobile on a mountain road between Curlew and Colville, Washington. An automobile approaching from the opposite direction crowded him off the road so that the right wheels of his car were down over the bank. Mr. Heatfield was alone at the

time of the incident and immediately attempted to get his car back on the road. In so doing he greatly overexerted and strained himself. Finally another motorist towed or pulled his car back down the road, and Heatfield then drove to a forest ranger camp where he got out of the car to get some water. Later the attendants at the camp heard a call for help and found Heatfield stretched out on the ground near his car. They took him into camp and put him to bed, and the next morning it was discovered that he had died.

It is the contention of the executor and widow that the above incidents establish a claim in accordance with the provisions of the above described policy, and claim is hereby made on you for payment of \$7,500.00 face value of the policy. On July 8, 1942 I wrote Lamping and Company in Seattle advising them that Heatfield had died and that claim would probably be made under the policy and that we intended to have an autopsy and giving an opportunity to the company to have an autopsy or to be present at the one we were making. Autopsy was held on July 10, 1942. Dr. Peter *Reed* attended the autopsy in your behalf. There were four persons interested in making of the autopsy: the widow, The Illinois Commercial Men's Association, Aetna Life Insurance Company, and your company. The pathologist's fee was \$50.00. I had an agreement with the Aetna and the Illinois Commercial Men's Association that the pathologist's fee would be divided between us and just before the autopsy was made, I was advised that M. E. Mack was representing your

company. Mr. Mack had no definite authority from you, but he indicated that the Standard Accident Insurance Company would pay its share of the [7] pathologist's fee. Therefore, at the proper time, I will ask you to reimburse me in the sum of \$12.50.

Will you please forward such proof of loss forms as you may require.

Very truly yours,

HARRY M. MOREY

HMM:MM

cc: Lamping and Co. [8]

EXHIBIT "C"

Proof of Loss Under Policy #CAC97R1387

State of Washington

County of Spokane—ss

Edna L. Heatfield, being first duly sworn, deposes and says: I am the widow of Augustus F. Heatfield who was insured with the Standard Accident Insurance Company under the terms of Policy number CAC97R1387 which policy was in full force and effect on June 30, 1942.

That on said date said Augustus S. Heatfield was driving his automobile between Curlew and Orient, Washington, and that he was forced off the road by a motorist coming from the opposite direction. That the right wheels of his automobile were over the bank. That he was alone. That it was necessary for him to complete his trip through Orient to Colville, Washington. That he endeavored to get the car back on the road; that in so doing he over exerted and strained himself and particularly his heart. That

after working a long time with the car another motorist towed him back on the road. That deceased then proceeded on his way to Orient and Colville but became so sick that he was unable to continue. That he was taken into a Forest Ranger's Camp where he continued to be sick. That he was assisted to bed by the men at the camp and was found dead the next morning.

That said Augustus S. Heatfield was in good physical condition prior to said June 30, 1942. That there was no evidence of any heart trouble.

That Dr. W. H. Gray, of Colville, Washington, who was called to examine the body by Coroner Osee Noble of Republic, Washington, stated that in his opinion deceased died of coronary occlusion caused by over-exertion.

That affiant believes that deceased died of coronary occlusion or some heart ailment, brought about by having been forced off the road and by over-exertion and strain in an attempt to get his automobile back on the road.

That demand is made on the Standard Accident Insurance Company for [9] payment of Seventy-five Hundred Dollars (\$7500.00) in accordance with the provisions of the above described policy.

EDNA L. HEATFIELD

Subscribed and sworn to before me this 25th day of August, A. D. 1942.

(Notarial Seal) HARRY M. MOREY

Notary Public in and for the
State of Washington, residing
at Spokane, Washington. [10]

[Endorsed]: Filed Dec. 19, 1942.

[Title of Court and Cause—State Court]

DEMURRER

Comes now the defendant and demurs to the plaintiff's Complaint on the following grounds:

I.

That the court has no jurisdiction of the person of the defendant or of the subject matter of the action.

II.

That the plaintiff has no legal capacity to sue.

III.

That there is a defect of parties, plaintiff or defendant.

IV.

That the complaint does not state facts sufficient to constitute a cause of action.

M. E. MACK

Attorney for Defendant.

Service accepted by receipt of copy hereof this 18 day of December, 1942.

HARRY M. MOREY

Attorney for Plaintiff.

[Endorsed]: Filed Dec. 23, 1942.

[Title of Court and Cause—State Court]

MOTION

Comes now the defendant and moves the Court to require the plaintiff to make her complaint more definite and certain as follows:

I.

a. To make paragraph 4 more definite and certain by stating what wheels of the car were over and down the bank.

b. The approximate distance from where the wheels that were down the bank were and those wheels that were not.

c. Where between Republic and Coville, Washington, the [11] deceased was forced off the highway, as set forth in said paragraph 4.

d. Give the name or names of those in the automobile coming in the opposite direction from the deceased that forced the deceased off the road.

II.

To make paragraph 5 of the complaint more definite and certain by stating therein what the deceased did “to get said automobile back on the road,” as alleged in paragraph 5.

That in the event that said foregoing Motion be denied, this defendant moves this Court that the information requested in the foregoing Motion be furnished by the plaintiff by way of a Bill of Particulars. That in support of this Motion for Bill of Particulars this defendant makes the records, files and

proceedings in this cause a part of this Motion, as well as the affidavit of M. E. Mack hereto attached.

M. E. MACK

Attorney for Defendant

State of Washington

County of Spokane—ss.

I, M. E. Mack, being first duly sworn on oath, depose and say: That I am the attorney for the defendant named in the foregoing Motion. That I know the contents of said Motion for a Bill of Particulars and that I personally know that the *Deft.* can not plead further to the Complaint without said information as required by the Bill of Particulars being first furnished.

M. E. MACK

Subscribed and sworn to before me this 18th day of December, 1942.

CHAS. P. LUND

Notary Public for the State of
Washington, residing at Spo-
kane

Service accepted by receipt of copy hereof this 18 day of Dec. 1942.

HARRY M. MOREY

Atty for Pltf.

[Endorsed]: Filed Dec. 23, 1942. [12]

[Title of Court and Cause—State Court]

MOTION TO STRIKE

Comes now the defendant in the above entitled action and moves the Court to strike from the plaintiff's complaint that part of paragraph 7 beginning with the words "that on July" in the 12th line on page 4, and to the end of said paragraph.

To strike that part of paragraph 7 beginning with the words "that more than" in the 16th line on page 4 and ending with the words "required by it" in paragraph 7, on page 4 in line 19.

M. E. MACK

Attorney for Defendant

Service accepted by receipt of copy hereof this 18th day of December, 1942.

HARRY M. MOREY

Atty for Pltf.

[Endorsed]: Filed Dec. 23, 1942.

[Title of Court and Cause—State Court]

BOND FOR REMOVAL

Know All Men By These Presents:

That we, Standard Accident Insurance Company, a corporation, as Principal, and the Fidelity and Deposit Company of Maryland, a corporation, as Surety, are held and firmly bound unto Edna L. Heatfield, Plaintiff in the above entitled action, in the penal sum of Five hundred and no/hundredths Dollars (\$500.00), lawful money of the United States,

for the payment of which sum well and truly to be made, we bind ourselves, our respective successors and assigns, jointly and severally, firmly by these presents.

Upon Condition, Nevertheless, That

Whereas, the said Standard Accident Insurance Company, a corporation, Defendant herein, has petitioned the Superior Court of the State of Washington, in and for Spokane County, for the removal of the above entitled cause therein pending, wherein the said Edna L. Heatfield is the Plaintiff and the said Standard Accident Insurance Company, a corporation, is Defendant, to the United States District Court for the Eastern District of Washington, Northern Division. [13]

Now, if the said Standard Accident Insurance Company, a corporation, shall enter into the said United States District Court for the Eastern District of Washington, Northern Division, within thirty days from the date of filing said petition, a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said United States District Court, if said Court shall hold that this suit is wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and effect.

(Seal) STANDARD ACCIDENT INSURANCE COMPANY

By Evart Lampint—Attorney in Fact

(Seal) FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By S. W. Holbrook—Attorney in Fact.

Service accepted by copy being received this 18th day of December 1942.

HARRY M. MOREY

Atty. for Plaintiff

[Endorsed]: Filed Dec. 23, 1942.

[Title of Court and Cause—State Court]

NOTICE OF REMOVAL

You and each of you are hereby notified that on the 23rd day of December, 1942 the defendant, Standard Accident Insurance Company of Detroit, Michigan, a corporation, will file with the Clerk of the above entitled Court their petition and bond, copies of which are herewith served upon you, for the removal of the above entitled cause to the District Court of the United States, Eastern District of Washington, Northern Division.

You are further notified that on the 19th day of December, 1942, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, the above named defendant, will present their petition and bond to the above entitled cause, to-wiz: to the presiding Judge thereof in the Court House in and for Spokane County, State of Washington, located in Spokane, Washington, for the purpose of having the Court sign an order accepting said petition and bond for removal of the said cause to the District Court of the United States, Eastern District of Washington, Northern Division. [14]

Dated, December 18th, 1942.

M. E. MACK

Attorney for Defendant

Service accepted by receipt of copy hereof this 18 day of December 1942.

HARRY M. MOREY

Atty. for Plaintiff

[Endorsed]: Filed Dec. 23, 1942.

[Title of Court and Cause—State Court]

PETITION FOR REMOVAL

Comes now the defendant above named and file their petition and respectfully shows the Court:

I.

That this action was begun against your petitioner in the Superior Court of Spokane County, Washington and is a civil action now pending in said Court; that your petitioner was served with a Summons and Complaint by service upon the Insurance Commissioner of Washington, at Olympia, Washington, on the 16th day of November, 1942, and it has not filed its answer in said action and the time for answering under the laws of the State of Washington will not expire until midnight on the 23rd day of December, 1942.

II.

That the time said action was commenced, plaintiff was and now is a resident and citizen of the

State of Washington; that the defendant, Standard Accident Insurance Company of Detroit, Michigan, is a Michigan corporation, and that at the time said action was commenced was and now is a resident and citizen of Michigan only, being at the time of the commencement and at this time a corporation organized and existing under the laws of the State of Michigan,

III.

That the above entitled action is of a civil nature at law and the matter in dispute therein between the plaintiff and your petitioner, the plaintiff demanding seventy-five hundred dollars (\$7,500.00) of the defendant and costs which exceeds the sum of three thousand dollars (\$3,000.00) exclusive of interest and costs, and that the plaintiff and your petitioner [15] are the only parties to said action and that the defendant controverts, denies and resists said entire demand of the plaintiff.

IV.

That your petitioner herewith offers and files a bond as provided by the laws of the United States upon the removal of a cause from the State Courts to the United States Court, which said bond is submitted to this Court.

Wherefore, your petitioner, Standard Accident Insurance Company of Detroit, Michigan, prays this Honorable Court to accept said bond and that the said cause be removed to the District Court of the Eastern District of Washington, Northern Division,

and that this Court proceed no further in the premises.

STANDARD ACCIDENT IN-
SURANCE COMPANY OF
DETROIT, MICHIGAN

By M. E. MACK
Petitioner

And By M. E. Mack
Attorney for Petitioner

Service accepted by receipt of copy hereof this 18
day of December 1942.

HARRY M. MOREY
Attorney for Plaintiff

State of Washington
County of Spokane—ss.

M. E. Mack, being first duly sworn, on oath deposes and says: that he is an attorney of record in the above entitled action for the said petitioner, Standard Accident Insurance Company of Detroit, Michigan; that he resides at Spokane, Washington, where he has his law office at 832 Old National Bank Building; that the petitioner has no officer resident or present in the County of Spokane, State of Washington to make this verification; that this affiant makes this verification for and on behalf of your petitioner; that this affiant has read the foregoing Petition for Removal, knows the contents thereof and knows the facts therein stated to be true.

M. E. MACK

Subscribed and sworn to before me this 18th day of December, 1942.

EDWARD J. CROWLEY

Notary Public in and for
State of Washington, Resid-
ing at Spokane, Wash.

[Endorsed]: Filed Dec. 23, 1942. [16]

[Title of Court and Cause—State Court]

ORDER OF REMOVAL

The defendant, Standard Accident Insurance Company of Detroit, Michigan, a corporation, having within the time provided by law, filed their petition for the removal of this cause to the District Court of the United States, Eastern District of Washington, Northern Division, and having at the same time offered and filed therein their bond in the sum of Two Hundred Fifty Dollars, (\$250.00) with Fidelity and Deposit Company of Maryland, a corporation, good and sufficient surety pursuant to statute, and conditioned according to law, and the Court being advised in the premises,

Now, Therefore, this Court does accept said petition and approve said bond and the surety thereon, and it is hereby

Ordered that this cause be and the same is hereby removed to the District Court of the United States, Eastern District of Washington, Northern Division,

and that no other or further proceedings be had in this Court in this cause, except that the Clerk of this Court furnish the defendant on their application and at their expense a duly certified transcript of all the files and records in this action for filing in the District Court of the United States, Eastern District of Washington, Northern Division.

Done in open Court this 23rd day of December, 1942.

CHAS. W. GREENOUGH,

Judge

Service accepted by receipt of copy hereof this 18 day of December, 1942.

HARRY M. MOREY

Attorney for Plaintiff

Endorsed]: Filed Dec. 23, 1942.

[Title of Court and Cause—State Court]

State of Washington

County of Spokane—ss.

CERTIFICATE

I, Frank C. Nash, County Clerk and Clerk of the Superior Court of the State of Washington, for the County of Spokane, do hereby certify that the above and foregoing is a full, true and correct copy of the record in the above entitled case on file in this office, and which I have been directed to prepare and transmit to the District Court of the United States for the [17] Eastern District of Washington, Northern Division.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Superior Court, this 23rd day of December, A. D. 1942, at Spokane, Washington.

(Court Seal) FRANK C. NASH,

Clerk

By NELS PAULSEN,

Deputy

[Endorsed]: Filed Jan 13, 1943

[Title of Court and Cause—U. S. District Court]

NOTICE

To Edna L. Heatfield and to Harry Morey, her attorney:

You and each of you are hereby notified that the above entitled action was, by the Superior Court of Spokane County, Washington, on the 23rd day of December, 1942, *order* transferred to the District Court of the United States for the Eastern District of Washington, Northern Division, in conformity with petition for removal, bond for removal, notice of removal, etc., heretofore served upon you.

You and each of you are therefore notified that the transcript of said Superior Court of Spokane, County, Washington, has been filed with the above entitled Court on the 13th day of January, 1943, and the number of said action is 316. You and each of you will therefore govern yourselves accordingly.

M. E. MACK

Attorney for Defendant.

Service accepted and copy received this 13th day of January, 1943.

HARRY M. MOREY,

Attorney for Plaintiff [18]

[Title of Court and Cause—U. S. District Court.]

ORDER DENYING MOTION FOR DISMISSAL

The above entitled matter coming on regularly for hearing by the Court on the 26th day of January, 1943, on defendants' demurrer filed in the Superior Court of the State of Washington, in and for the County of Spokane, and considered a motion by defendant for dismissal in this court, and after hearing said motion and argument of counsel, and the court being fully advised in the premises, it is by the court

Ordered, that said motion for dismissal be and the same is hereby denied.

Done in open court this 28 day of Jan. 1943.

L. B. SCHWELLENBACH,
Judge.

Presented by

HARRY M. MOREY

Attorney for Plaintiff

Approved as to form

M. E. MACK

Attorney for Defendant

[Endorsed]: Filed Jan 28, 1943.

[Title of Court and Cause—U. S. District Court.]

ORDER DENYING MOTION TO STRIKE

The above entitled matter coming on for hearing by the Court on January 26, 1943, on defendant's motion to strike parts of Paragraph VII of plaintiff's complaint, and after hearing said motion and the argument of counsel, and the Court being fully advised in the premises, it is by the Court

Ordered, that said Motion to Strike be and the same is hereby denied.

Done in open Court this 28 day of Jan. 1943

L. B. SCHWELLENBACH

Judge

Presented by:

HARRY M. MOREY

Attorney for Plaintiff.

Approved as to form:

M. E. MACK

Attorney for Defendant.

[Endorsed]: Filed Jan 28, 1943. [19]

[Title of Court and Cause—U. S. District Court.]

**ORDER ON MOTION TO MAKE MORE
DEFINITE AND CERTAIN**

The above entitled matter coming on regularly for hearing on January 26, 1943, on defendant's motion to make plaintiff's complaint more definite and certain, and after hearing said Motion and the

argument of counsel, and the Court being fully advised in the premises, it is by the Court

Ordered, that said Motion be and the same is hereby granted as to sections a, b and c of Paragraph I and as to Paragraph II of said Motion, and denied as to section d of Paragraph I.

It is further Ordered that the information ordered to be furnished be furnished by way of a Bill of Particulars.

Done in open court this 28 day of Jan. 1943.

L. B. SCHWELLENBACH,
Judge

Presented by:

HARRY M. MOREY

Attorney for Plaintiff.

Approved as to form:

M. E. MACK

Attorney for Defendant.

[Endorsed]: Filed Jan 28, 1943.

[Title of Court and Cause—U. S. District Court.]

BILL OF PARTICULARS

Comes now the plaintiff and complying with the Order of the Court, answers defendant's Motion to Make the Complaint More Definite and Certain as follows:

I.

Answering section a of Paragraph I of the Motion, plaintiff states that to the best of her knowl-

edge and belief, all of the wheels of the automobile were to the right of the right hand wheel tracks in the road.

II.

Answering Section b of Paragraph I of the Motion, plaintiff states [20] that to the best of her knowledge and belief the distance between the left and right wheels is approximately the width of the car.

III.

Answering Section c of Paragraph I of the Motion, plaintiff states that to the best of her knowledge and belief the location on the road at which deceased was forced off the road was approximately two miles west of the Summit of the road which extends from Curlew to Orient, Washington, or approximately 10 or 12 miles east of the town of Curlew, Washington.

IV.

Answering Paragraph II of defendant's Motion, plaintiff states that to the best of her knowledge and belief deceased moved or attempted to move a log approximately 15 feet long and 8 to 10 inches in diameter, and moved or attempted to move large rocks and shoveled dirt and stones and did other acts in an effort to get his car back on the road.

HARRY M. MOREY

Attorney for Plaintiff
1015 Paulsen Building
Spokane, Washington

State of Washington

County of Spokane—ss.

Harry M. Morey, being first duly sworn, deposes and says: That he makes this verification for and on behalf of the plaintiff for the reason that plaintiff is not now in Spokane County to verify, and for the further reason that affiant has all of the information that plaintiff has; that he has read the foregoing Bill of Particulars, and the facts therein stated are true as he verily believes.

HARRY M. MOREY

Subscribed and sworn to before me this 29th day of January, 1943.

[Seal]

W. S. GILBERT

Notary Public in and for the
State of Washington, residing
at Spokane

Copy of the foregoing Bill of Particulars received this 29th day of January, 1943.

M. E. MACK,

By L.

Attorney for Defendant. [21]

[Title of Court and Cause—U. S. District Court.]

ANSWER

Comes now the defendant and for answer to plaintiff's complaint, alleges:

I.

Answering paragraphs I, II and III of said com-

plaint this defendant admits the allegations therein alleged.

II.

Answering paragraphs IV and V this defendant denies each and every allegation, matter and thing contained in paragraphs IV and V of the plaintiff's complaint.

III.

Answering paragraph VI this defendant admits the same.

IV.

Answering paragraph VII this defendant denies each and every allegation, matter and thing contained in paragraph 1 thereof, so denominated by this defendant.

Further answering paragraph VII and paragraph 2 thereof, so denominated by this defendant, this defendant admits the same.

Further answering paragraph VII this defendant denies each and every allegation contained in paragraph 3 thereof, so denominated by this defendant.

Further answering said paragraph VII relative to paragraph 4 thereof, so denominated by this defendant, this defendant admits that portion thereof reading as follows:

“That more than fifteen (15) days elapsed since receipt by defendant of plaintiff's letter of July 30th, 1942, and no forms having been furnished by defendant for proof of loss required by it,”

and further admits that the original of Exhibit

“C” attached to the complaint, was received on or about the 26th day of August, 1942, and denies each and every other allegation in said paragraph contained.

Further answering paragraph VII, being paragraph 5 thereof, so denominated by this defendant, this defendant admits that more than sixty (60) [22] days have elapsed since the receipt of the original of Exhibit “C”, attached to this complaint, and further admits the remainder of said paragraph excepting that part reading as follows:

“That plaintiff has done all things required by the policy of insurance to be done by her,”

which latter quoted portions specifically denies each and every quoted portion thereof.

As a first complete and affirmative defense this defendant alleges:

I.

Said policy on which this action is based contains the following provision:

“S. Full compliance of the insured and beneficiary with all provisions of this policy is a condition precedent to recovery hereunder and any failure in this respect shall forfeit to the Company all right to any indemnity.”

II.

That the plaintiff, or anyone in her behalf, totally failed to comply with paragraphs D (4) and E (5), or either of them, set forth in paragraph VI of plaintiff's complaint.

III.

That the policy on which this action is brought is exclusively a policy payable in the event of accidental death or bodily injury, effected directly, exclusively and independently of all other causes through accidental means except when intentionally self-inflicted, subject to all the conditions and limitations in said policy contained, and that the said plaintiff and no one for her or in her behalf gave any notice to this defendant in any manner whatsoever, or to any authorized agent of the company, of any bodily injury occurring through accidental means, for which this defendant is liable under said policy within the provision of D(4) or E (5) aforesaid or within the said twenty days provided in said provisions, and this plaintiff is not entitled to recover.

As a second complete and affirmative defense this defendant alleges:

I.

That under the aforesaid policy, before there could be a liability, it was necessary and essential, as set forth in paragraph II of plaintiff's complaint, that the death of the said Augustus S. Heatfield be effected directly, [23] exclusively and independently of all other causes through accidental means, except when intentionally self-inflicted.

II.

That there are no allegations in the plaintiff's complaint that the deceased came to his death through accidental means, as stated in the preceding paragraph.

As a third complete and affirmative defense defendant alleges:

I.

This defendant makes a part of this third defense paragraph 1 of the first affirmative defense the same as though it were set out herein in full.

II.

That the plaintiff, and no one for or in her behalf, ever furnished to the defendant proof of loss within ninety (90) days from June 30, 1942, as required by G (7) as set forth in paragraph VI of the plaintiff's complaint, as is required in said paragraph and the last portion thereof. That by reason of said failure plaintiff is not entitled to recover.

Wherefore this defendant prays that the plaintiff's complaint be dismissed and that the defendant have and recover its costs and disbursements.

M. E. MACK

Attorney for Defendant

State of Washington

County of Spokane—ss.

I, M. E. Mack being first duly sworn, on oath deposes and say: That I am the attorney for the defendant named in the foregoing Answer. That no officer or agent of the defendant is at this time in Spokane County, Washington, to verify this Answer. That I know the contents of said Answer and believe the same to be true.

M. E. MACK

Subscribed and sworn to before me this 4th day of February, 1943.

[Seal]

GLENN E. CUNNINGHAM

Notary Public for the State
of Washington, residing at
Spokane.

Service accepted and copy received this 5th day of February, 1943.

HARRY M. MOREY,

By DIM

Attorney for Plaintiff

[Endorsed]: Filed Feb. 8, 1943. [24]

[Title of Court and Cause—U. S. District Court.]

REPLY

Comes now the plaintiff and reply to defendant's Answer, admits, denies and alleges as follows:

Replying to the First Affirmative Defense, the plaintiff

I.

Admits the allegations of Paragraph I of the First Affirmative Defense.

II.

Denies each and every allegation, matter and thing contained in Paragraph II of the First Affirmative Defense.

III.

Admits "that the policy on which this action is

brought is—a policy payable in the event of accidental death or bodily injury effected directly, exclusively and independently of all other causes through accidental means except when intentionally self-inflicted, subject to all the conditions and limitations in said policy contained” and denies each and every other allegation, matter and thing contained in said Paragraph III.

Further replying to Paragraph II and III of the First Affirmative defense, the plaintiff alleges that although plaintiff, on or about July 8, 1942, knew that Augustus S. Heatfield had an accident policy with the defendant company, and although effort had been made by her to find said policy, it was not until more than twenty days after the death of said Augustus S. Heatfield, to-wit, on or about August 11, 1942, that the insurance policy was found and placed in her possession, and that it was not until said named date that plaintiff knew the specific provisions of said policy relative to giving notice to the defendant.

Replying to the Second Affirmative Defense, the plaintiff

I.

Denies that there are no allegations in plaintiff's complaint that the deceased came to his death through accidental means as provided in said policy.

Replying to the Third Affirmative Defense, the plaintiff

I.

Admits paragraph I thereof. [25]

II.

Denies each and every allegation, matter and thing contained in Paragraph II of the Third Affirmative Defense.

Wherefore, having replied to defendants answer, plaintiff prays for judgment against the defendant as prayed for in her complaint.

HARRY M. MOREY

Attorney for Plaintiff
1015 Paulsen Building
Spokane, Washington

State of Washington

County of Spokane—ss.

Harry M. Morey, being first duly sworn, deposes and says: That he is the attorney for the plaintiff in the above entitled actipn; that he makes this verification for and on behalf of the plaintiff for the reason that the plaintiff is not now within the State of Washington; that he has read the foregoing Reply; is familiar with its contents and the matters therein stated are true as he verily believes.

HARRY M. MOREY

Subscribed and sworn to before me this 23d day of February, A. D. 1943.

[Seal]

W. C. LOSEY

Notary Public in and for the
State of Washington, re-
siding at Spokane, Wash-
ington

Copy of the foregoing Reply received this 23d day of February, 1943.

M. E. MACK,

By L.

Attorney for Defendant

[Endorsed]: Filed Feb 23, 1943. [26]

[Title of Court and Cause—U. S. District Court]

INTERROGATORIES TO BE PROPOUNDED
TO DEFENDANT

Interrogatories propounded by the plaintiff to the defendant and to be answered by the defendant or any officer thereof competent to testify as a witness in its behalf. The answers to be made, signed and sworn to and returned and used at the trial of the above entitled action as provided by the statutes of the United States and the rules of Federal procedure.

Interrogatory No. 1. I will ask the person who makes answer to these interrogatories to state his name, age and his official capacity with the Standard Accident Insurance Company of Detroit, Michigan.

Interrogatory No. 2. Is it not a fact that Lamping and Company, a corporation, was on June 30th, 1942, and ever since that date has been an authorized agent of the Standard Accident Insurance Company of Detroit, Michigan?

Interrogatory No. 3. If you have answered interrogatory No. 2 in the negative, and if Lamping

and Company has been named authorized agent of The Standard Accident Insurance Company of Detroit, Michigan, since June 30, 1942, please state the date on which it was made such authorized agent.

Interrogatory No. 4. Is it not a fact that on June 30, 1942 and ever since that date Lamping and Company had one of its offices in the city of Seattle, Washington?

Interrogatory No. 5. Is it not a fact that the original or copy of a letter of which the attached copy marked Exhibit "A" is a true copy of the substance and words used, has been received at the Home Office of the [27] Standard Accident Insurance Company of Detroit, Michigan?

Interrogatory No. 6. If you have answered interrogatory No. 5 in the affirmative is it not a fact that Lamping and Company of Seattle, Washington sent the Home Office of the defendant company the original or copy of said letter?

Interrogatory No. 7. If you have answered interrogatory No. 5 in the affirmative please state the date on which the original or copy of said letter was received at the Home Office of the defendant company.

Interrogatory No. 8. Is it not a fact that the original of a letter of which the attached copy marked Exhibit "B" is a true and correct copy of the substance and words used, was received at the Home Office of the defendant company?

Interrogatory No. 9. If you have answered interrogatory No. 8 in the affirmative please state

the date that said letter was received.

Interrogatory No. 10. Will you please attach the exhibits "A" and "B" that are attached to these interrogatories to your answers to the interrogatories.

Original of the foregoing interrogatories Nos. 1 to 10 received this 12nd day of February, 1943.

M. E. MACK

Attorney for defendant, The
Standard Accident Insurance
Company of Detroit,
Michigan.

(Clerk's Note: Here follows copy of Exhibit "A" to complaint at page 6 of this transcript.)

(Clerk's Note: Here follows copy of Exhibit "B" to complaint at page 7 of this transcript.)

[Endorsed]: Filed Feb. 15, 1943. [28]

[Title of Court and Cause—U. S. District Court.]

ANSWERS TO INTERROGATORIES PRO-
POUNDED TO DEFENDANT BY PLAIN-
TIF, AND STIPULATION

It Is Hereby Stipulated by the respective parties to this cause, Harry M. Morey representing the plaintiff, and M. E. Mack representing the defendant, as follows:

That the said Interrogatories may be answered by M. E. Mack for and on behalf of the defendant with the same force and effect as though an-

swered by an official of the defendant, and that the same may be used in evidence by either party to this proceeding, and that Interrogatory 1 therefore need not be answered.

Dated this 19th day of February, 1943.

HARRY M. MOREY

Attorney for Plaintiff

M. E. MACK

Attorney for Defendant

Answering Interrogatory 2, the answer is
Yes.

Answering Interrogatory 4, the answer is
Yes.

Answering Interrogatory 5, the answer is

It is a true copy of the words used, and a copy thereof was received by the defendant at its Home Office at Detroit, Michigan, July 20, 1942.

Answering Interrogatory 6 the answer is

a copy of Exhibit A was sent to the Home Office of the defendant company by Lamping & Co. and received by it there July 20, 1942.

Answering Interrogatory 7, the answer is

a copy of said letter was received at the Home Office of the defendant company July 20, 1942.

Answering Interrogatory 8, the answer is

the original letter marked Exhibit "B" is a true copy of the words used and was received at the Home Office of the defendant company at Detroit, Michigan August 3, 1942.

Answering Interrogatory 9, the answer is
August 3, 1942.

Answering Interrogatory 10, the answer is
Yes.

M. E. MACK,
Attorney for Defendant

Copy of Answers to Interrogatories and Stipulation, received this 19th day of February, 1943.

HARRY M. MOREY
Attorney for Plaintiff

[Endorsed]: Filed April 14, 1943. [29]

[Title of Court and Cause—U. S. District Court.]

DEMAND FOR JURY

To: Standard Accident Insurance Company of Detroit, Michigan, and to M. E. Mack, its attorney, and to Aram A. LaFramboise, Clerk of the above entitled Court:

You and each of you will please take notice that plaintiff respectfully demands trial of the above entitled action by jury, and the Clerk is respectfully requested to set this case on the trial docket as a jury trial.

HARRY M. MOREY
1015 Paulsen Building
Attorney for Plaintiff

Copy of the foregoing Demand for Jury received this 2d day of March, 1943.

M. E. MACK,
By L
Attorney for Defendant.

[Endorsed]: Filed Mar 3, 1943. [30]

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. 316

EDNA L. HEATFIELD,

Plaintiff,

vs.

STANDARD ACCIDENT INSURANCE COM-
PANY of Detroit, Michigan,

Defendant.

Before The Honorable L. B. Schwellenbach,
Judge, and a Jury duly impanelled and Sworn. On
April 14, 15, 1943. At Spokane, Washington.

Appearances: For the Plaintiff: Mr. Harry M.
Morey, Counsel. For the Defendant: Mr. M. E.
Mack, Counsel. Reporter: J. J. Cole.

STATEMENT OF FACTS [31]

On this 14th day of April, 1943, the above enti-
tled cause coming on for hearing and for trial before
the Honorable L. B. Schwellenbach, Judge of the
above styled Court, and a Jury to be impanelled
and sworn to try the same, and all parties having
announced ready for trial, the following proceedings
were had, testimony taken and exhibits introduced.

Whereupon: A Jury was impanelled and sworn
to try the cause.

Whereupon: The opening statement for the Plain-
tiff was made by Mr. Morey as follows:

Mr. Morey: May it please the Court, Ladies and Gentlemen of the Jury:

It is my privilege and my duty at this time to try to outline to you the facts in this case as they will be presented by the Plaintiff. It is not my privilege and I would not exercise it if I had it, to attempt at this time to argue the case. I am simply trying to give you the facts and issues in the case so as we present the testimony you may have a clearer picture than you now have.

My client, Mrs. Edna L. Heatfield, is the widow of August S. Heatfield, or 'Gus' Heatfield, as he was more commonly called. He held and had for many years, held an accident policy with the Standard Accident Insurance Company. One of the provisions of that policy is that the Company will pay if death is sustained, is affected directly, exclusively and independently of all other causes through accidental means, and that, Ladies and Gentlemen [32] of the Jury, will probably be the question in this case, whether or not this death was caused by accidental means. The policy had its usual provisions for the giving of notice to the insurance company in the event of an accident or the death under the policy and we will offer evidence to you to show that about eight days after this accident we, in writing, advised the authorized agent of the company and that two or three days thereafter the insurance company through its doctor, attended an autopsy which we advised the company would be held. The policy provides that after the company receives such notice, it will furnish the assured with proof of loss forms,

and the evidence will show that no proof of loss forms were received in fifteen days as provided in the policy, and the policy also provides within ninety days the party may submit his or her own proof of loss, and the evidence will show within ninety days we did submit this proof of loss.

Now Mr. Heatfield at the time of his death, which was June 30th, 1942, was a man sixty-five years of age. He had been Special Agent for an insurance company for many years. His duties were office duties and calling upon his agents, not a man, the evidence will show, accustomed to any hard manual labor. The evidence will show he was in good physical condition; that he had not had any heart trouble. The evidence will show that at the autopsy it was disclosed that Mr. Heatfield had a form of arterio-sclerosis, or hardening of the arteries, not necessarily, the evidence will show, of and by itself sufficient [33] to cause his death. On June 30th, 1942, the evidence will show he left home in his accustomed health for a trip up to Republic and Colville, traveling by car. We will have evidence from a witness in Republic, who saw him at noon, or early after noon of that date, and Mr. Heatfield was in the same, the evidence will show, in his accustomed state of health. Then he attempted to go over, what is called the 'hump,' from Curlew to Orient and then down to Colville. The evidence will show that the road was a dirt road, narrow, winding mountain road and going through a very isolated country where there were no farms, service stations, garages, *no* anything so far as habitation

was concerned at the point where he met this accident. We will endeavor to introduce in evidence that his car was forced off this narrow road and he was alone. We will endeavor to introduce evidence he was of a nervous temperament and that he endeavored, evidently, to get this automobile back on the road, doing all of that work by himself. We will attempt to introduce evidence that his efforts in so doing were unusual efforts for him, out of the ordinary, unexpected, and that while he was so laboring alone a motorist came along and had to tow his car, pull his car back on the road. We will have evidence from this motorist and his wife that when they arrived Mr. Heatfield was in an exhausted state of health, worn out, holding his hand over the front part of his body. He complained of heart pains and that he said he had worked there for two hours and had had to rest part of the time, and wore himself out. We will then have [34] evidence that he went about two miles to a forest ranger's camp to get some water and started from there and the boys heard his car stop and went out to see what was the matter and there he was stretched on the ground suffering in agony sick, and the evidence will show the boys took him into the cabin—that no medical aid was called—he didn't want any. They put him to bed and when they went to call him the next morning, he had died, and, as I stated a short time ago, an autopsy was performed which showed that the condition of Mr. Heatfield's body, and having proved those things, and the Court

having instructed you in the law, we will ask for a verdict at your hands.

Judge Schwellenbach: Do you wish to make your statement at this time?

Mr. Mack: My intention is to reserve it at this time.

Whereupon: An adjournment was taken to 1:45 P. M., at which time, all parties present, the trial resumed. [35]

LEWIS MURPHY,

a witness called for and on behalf of the Plaintiff, having been duly sworn, testified as follows on

Direct Examination

By Mr. Morey:

Q. State your name, please.

A. My name is Lewis Murphy.

Q. Where do you reside?

A. In Republic, Washington.

Q. What is your business or occupation there?

A. I am a County Clerk at the present time.

Q. Of Ferry County? A. Correct.

Q. How long have you lived in Republic, Mr. Murphy? A. Since the year 1907.

Q. Did you know August S. Heatfield, commonly known as 'Gus' Heatfield? A. Yes.

Q. How long had you known Mr. Heatfield?

A. I will have to do a little figuring there. Since about 1915, possibly.

Q. Did you have occasion to see Mr. Heatfield the latter part of June, 1942? A. Yes.

(Testimony of Lewis Murphy.)

Q. Do you remember the day you saw him?

A. I figured out the date, it was June 30th.

Q. Where did you see him? [36]

A. In the insurance office in Republic.

Q. Some agent for him?

A. He was talking to his agent there, his local agent, and I met him there.

Q. About what time of day was that?

A. I wouldn't be too sure, between 2 and 3 in the afternoon.

Q. I see. About how long a time would you say you spent with Mr. Heatfield that afternoon?

A. I was somewhat busy, it wouldn't have been over twenty minutes.

Q. You visited with him, did you?

A. Yes.

Q. What was the physical appearance of Mr. Heatfield, as you observed at that time?

A. As I recall, he was the same old Gus Heatfield.

Q. Was there any evidence of any physical ailment? A. No.

Q. No shortness of breath?

A. Not that I observed at all.

Q. I am not asking you to tell us the conversation, but was there some discussion between you and Mr. Heatfield as to the route he was going to take from Republic to the place he was going?

A. He inquired——

Mr. Mack: I object to that——

Judge Schwellenbach: Just answer that ques-

(Testimony of Lewis Murphy.)

tion 'yes' or 'no'. Your objection goes to the [37] question?

Mr. Mack: I object to the question as hearsay.

Judge Schwellenbach: Objection overruled.

Question read: 'I am not asking you to tell us the conversation, but was there some discussion between you and Mr. Heatfield as to the route he was going to take from Republic to the place he was going'?

A. Yes.

Q. I think I will ask you did you advise him the route he was to take?

A. I sent him to people who would know all about the condition of the road.

Q. I see. And you think you broke away from him there at Republic possibly about three?

A. It wouldn't have been later than that.

Q. By the way, Mr. Murphy, how far is it from Republic to Curlew?

A. I would say about twenty-one miles.

Q. Did you have occasion to observe the kind of car Mr. Heatfield was driving? A. Yes.

Q. What kind of a car was it?

A. As I recall, it would be a black coupe.

Q. What make?

A. I didn't observe that.

Mr. Morey: That is all.

Mr. Mack: That is all.

(Witness excused.) [38]

RALPH HARRINGTON,

a witness called for and on behalf of the Plaintiff,
having been duly sworn, testified as follows on

Direct Examination

By Mr. Morey:

Q. State your name.

A. Ralph Harrington.

Q. Where do you reside?

A. Seven miles northeast of Curlew, Washington.

Q. What road do you live on?

A. The Deer Creek road.

Q. That road runs from what town to what town?

A. From Curlew—well, it don't come from no town on the other side, it comes into the main highway the other side, that side of Orient.

Q. Then the highway runs down to Colville?

A. Yes.

Q. How long have you lived in that country?

A. About nine years.

Q. What is your occupation?

A. A school bus driver and farmer.

Q. You own a farm out there on that road?

A. Yes.

Q. On June 30th, 1942, what town had you been to, you and your wife?

A. We had been to Colville.

Q. And then tell us what road you followed to go from Colville to your home.

A. We took the highway down to the foot of

(Testimony of Ralph Harrington.)

Summit [39] Hill, and then come across the summit on the regular Colville road.

Q. That's the road you have been talking about?

A. Yes.

Q. Now did you, on that trip, observe an automobile that was off the road? A. Yes.

Q. At the point where you observed the automobile off the road, Mr. Harrington, I wish you would tell the Jury what kind of a road it was.

A. It was a new built road, only been built about a year since they built it over, and there was soft shoulders and narrow road.

Q. About how wide was the road at that point where you found the car off the road?

A. Oh, about, I imagine, sixteen foot road bed there.

Q. Were there any fences along the roadway?

A. No.

Q. Now that road leads up from Curlew—how far from Curlew do you live? A. Seven miles.

Q. And the farms are scarce from Curlew up to your place? A. Yes.

Q. When you get east of your place going over to Orient, are there any houses at all?

A. Not until you get clear over on the other side—one mile up on the other side there is one there.

[40]

Q. No service stations or garages? A. No.

Q. Where is this place you found this disabled car with reference to the road, how far East of Curlew? A. About eleven miles.

(Testimony of Ralph Harrington.)

Q. How good a view did you have of this car before you actually came to it?

A. Well, I would say about three hundred feet.

Q. Then what was there in the road that obstructed the view?

A. We come around the curve.

Q. Now, I wish in your own words, you would tell the Jury what you observed. Tell them first, if you will, where that car was.

A. The car was clear over the road. Clear over the shoulder. One front wheel was clear off the shoulder of the road and the back hind wheels, one was clear down over the shoulder and the other in the soft shoulder of the road.

Q. By the way, about how high is that shoulder there? A. Well——

Q. If you want to compare it with some object in the room——

A. About so high (indicating) somewhere near that, about six feet.

Q. Did you observe any individual there, a man there? A. Yes.

Q. Where was this man when you first saw him?

A. He just stepped out from behind the car into the road to stop me, to pull him out. [41]

Q. What kind of a car was that?

A. It was a dark black Ford coupe, I would say '40 model.

Q. Now what was the appearance of this man you saw there?

(Testimony of Ralph Harrington.)

A. Well, he seemed pretty tired and fagged out and seemed worried.

Q. Was he alone? A. Yes.

Q. Anybody else around there to help him?

A. No.

Q. What did you do then?

A. I stopped and then I got out and looked at the car to see what condition it was in.

Q. All right. Now then, if you will tell us, please, sir, what condition was the car in?

A. Well, the car was there to stay without help. It was down over the bank in the soft dirt and there was a rock under the running board in front of the rear wheel and that dirt was soft on that side and it just kept burying down. He had evidently tried to build it up and get it up on this boulder to get back on the road, but it was so soft all his efforts was lost whenever he tried it.

Q. Had a shovel been used?

A. Yes, he had a shovel.

Q. Where was the shovel?

A. It was in the back of the car, laying in back of the car—the lid was up. [42]

Q. Could you see where he had shoveled?

A. You could see where he had shoveled dirt, all right.

Q. You spoke about a rock that was under the running board. What did you do with that rock?

A. I got down and dug a little dirt away from it and pulled it out from under the car to get it out of the way.

(Testimony of Ralph Harrington.)

Q. Then what did you do?

A. Then I tried to turn around but the road was so narrow I couldn't turn around, so I backed up and hooked on to him with the front of my car and backed up and pulled him up thataway, pulled him onto the road.

Q. About how long did it take you to go from Colville to the place where you found this disabled car?

A. I would say about an hour and a half, probably.

Q. I am handing you a picture marked for identification "Plaintiff's Exhibit A", and I will ask you if that looks like the road at the place where you found this disabled car.

A. Yes, it looks like the road there.

Mr. Morey: I offer Plaintiff's exhibit A in evidence.

Mr. Mack: We have no objection.

Judge Schwellenbach: It may be admitted. Do you want to show that to the Jury now?

Mr. Morey: I think I will, your Honor.

(Exhibit A passed to the Jury for examination.)

Mr. Morey: I think that is all. [43]

Cross Examination

By Mr. Mack:

Q. Have you got in mind exhibit A, the one you just saw without seeing it again? A. Oh, yes.

Q. You were, as I gathered from your state-

(Testimony of Ralph Harrington.)

ment, you were coming around that curve that shows in that picture. A. Yes.

Q. You didn't observe, obviously, until you turned around the curve, until you got pretty near around, this car.

A. No, I didn't notice nothing.

Q. When you got around it, you saw a man standing in the center of the road.

A. No, he come out from behind the car as I saw it, stepped into the road as I came around.

Q. He came from behind the car?

A. Yes, the car was sitting there. I couldn't tell whether he was behind it—it was from the car anyway.

Q. You couldn't see what he was doing through the car. A. No.

Q. You never saw anything he was doing—personally you never saw him doing a thing.

A. Well, no, not that I saw.

Q. Your car was coming toward the front end of his car, is that correct? A. Yes. [44]

Q. So that he was obviously on the opposite of the road you were.

A. Yes, on the opposite side.

Q. Where did you stop with reference to his car?

A. Oh, I got a little ways past it before I stopped dead still.

Q. How fast, about, were you going when you first saw it?

A. Twenty miles, maybe fifteen.

(Testimony of Ralph Harrington.)

Q. The highway was as good as it looks in the picture, exhibit A?

A. No, that picture, like all pictures, shows a better road than was there.

Q. Who was with you in this car?

A. My wife and three boys and my daughter.

Q. Did she get out with you?

A. Yes, they all got out.

Q. When you got out you did just what, please, sir, show us what you did after you got out.

A. I just looked it over to see what shape it was in and took the rock out so it wouldn't tear the fender and running board off.

Q. And then you pulled the car out?

A. Yes, after I got around to pull it. I backed up and tried to turn around but I couldn't.

Q. You had to back up your car some.

A. Yes.

Q. You say you had occasion to observe this gentleman [45] who was there? A. What?

Q. You had occasion to see him—observe him?

A. Yes.

Q. Just what character or sign did he make to stop you? A. He just held his hand up.

Q. And you saw the car then and the condition it was in.

A. Yes. I would have stopped anyway when he held his hand up.

Q. He didn't make any motions at all—just held up his hand? A. No, just held up his hand.

(Testimony of Ralph Harrington.)

Q. Was he standing in front of your car when he held up his hand? A. No.

Q. He was at the side of your car so you could go by? A. Yes.

Q. How close did you get to him, do you think, how close did you get to this man whoever he might be?

A. I got close enough he talked to me through the car window.

Q. Through what car window?

A. My own car.

Q. You didn't get any closer than that?

A. The window was down, I talked to him, he was right there at the window. [46]

Q. Then you got out of the car—what did you do then—just make arrangements to pull him out?

A. Yes.

Q. How long were you there, do you think, from the time you stopped until the time you left?

A. Oh, probably twenty minutes.

Q. You tried to turn around? A. Yes.

Q. And had to back up. A. Yes.

Q. How did you pull him out?

A. With the chain hooked from my bumper to his.

Q. You got behind his car? A. Yes.

Q. Did you do anything behind the car itself?

A. No.

Q. Did I understand you to say you just took out a stone that was in the front under his car?

A. That was the rear side—the rear wheel.

(Testimony of Ralph Harrington.)

Q. How big a stone was it?

A. Well, it was—I would say it was probably—must have been two feet long, maybe a foot wide, something like that.

Q. Would that stone in any way stop the progress of his car—was it sufficiently large enough for that?

A. Oh, no.

Q. It was just a matter of your being cautious so that nothing would happen. [47]

A. He might have put the rock there so he could get on to it—I don't know.

Q. I am not asking you that. I am asking if you were just being cautious so that nothing would happen when you pulled him out.

A. Yes, that was the idea.

Q. Just where were the left front wheels of his auto?

A. Well, it was on the shoulder of the road, the left one.

Q. And the right front wheels, where were they?

A. Down over the shoulder, down next to the ditch.

Q. How close to the ditch? I don't know as I understand.

Question Read: "How close to the ditch?"

Q. So as to make it clear, I will hand you Plaintiff's exhibit A.

A. You see this is what I call the ditch, there is hardly no ditch there.

Q. What do you mean by the shoulder?

A. This right here—right at the edge of the road.

(Testimony of Ralph Harrington.)

Q. And the road was how wide?

A. I don't think it was over sixteen feet, it might not be that. I couldn't say for sure.

Q. In other words, this is your sixteen feet (indicating on photo). A. Yes.

Q. And what there would be over that sixteen feet, that is what you call the shoulder.

A. Well yes, this here. [48]

Q. So, as a matter of fact, there really isn't any shoulder there.

A. Oh, yes—this is about six feet high—this is the road—this was built up.

Q. I don't think you understand. Assuming the road is sixteen feet wide, how wide was the shoulder at the end of the road, if there was any?

A. You mean, how wide is this here?

Q. I am asking you what you mean by shoulder, how wide would be the shoulder of the road?

A. The shoulder is this part here, just the end of the road where you start for the bank.

Q. Does it cut down pretty sharply?

A. Yes, fairly steep.

Q. Now, with reference to the left front wheels, I mean the wheels, the nearest wheels to the road.

A. Right in here—this was a new road—this was soft—that's where he slid along and shoved the dirt in front of him.

Q. How close to the very edge of the road, including the shoulder, were the two front wheels where they were close to the road?

A. Well, the left wheel would be about maybe a

(Testimony of Ralph Harrington.)

foot from being on the hard packed part of the road and the other——

Q. And the hind one was where?

A. It was further down here set kind of wedge shaped.

Q. Clear over the shoulder? A. Yes. [49]

Q. And the automobile was approximately how long? A. About sixteen feet, or eighteen.

Q. And the width of the automobile was what?

A. About five feet—four or five.

Q. Could be in the neighborhood of six feet.

A. Yes.

Q. So, as a matter of fact, if the front wheel was just a foot from the edge or shoulder of the road, and the other hind wheel on the left side, or the same side, was a foot down, the others must be pretty near in the ditch.

A. Well, down in the rubbish in there.

Q. You said that had been put there to stay, I think you used that expression——

A. What I mean he was helpless, he couldn't get out without help.

Q. The only possible way he could get out was to be pulled out. A. Yes.

Q. Did you happen to observe this log?

A. I couldn't say that was exact log, but the road was all about the same right in there.

Q. Did you look to see how he got in that position? A. Yes.

Q. What time of day was it you came up there?

(Testimony of Ralph Harrington.)

A. Oh, about six—a quarter after—somewhere in there.

Q. You were there about twenty minutes?

A. I imagine. [50]

Q. When you attached your automobile bumper to his, can you tell us just about the direction you went?

A. Yes, I got as near frontwise of his car as possible so I could stay on the hard surface, then I tied the bumpers together, then started his motor, he did, and I started mine—and we put the clutch together and pulled out.

Q. You had to go quite a ways, did you, to straighten him up?

A. Yes, I backed quite a ways.

Q. About how far?

A. About twice or three times the length of the car.

Q. In the meantime, he was helping you guide his car? A. Yes.

Q. After you got him up on the road, he went on after you unhooked the chain? A. Yes.

Q. How close was the next nearest town that you just left just before you met his automobile?

A. Between twenty and thirty miles, I wouldn't say exactly.

Q. As you came down that road, did you notice anything else there, road camps or anything of that kind?

A. No, nothing, only the forest camp at the summit.

(Testimony of Ralph Harrington.)

Q. How far was that from the summit?

A. Well, he was about two miles, I guess.

Q. You don't know anything that happened after he went on and you went on? [51]

A. No.

Q. I assume he thanked you.

A. Yes.

Q. When you first drove up and got out, it was evident to you that no one man could ever get that automobile out.

A. Yes.

Q. When had you gone over that road before that particular day, if you did?

A. How was that?

Q. When did you go over that same road before that?

A. About eight that morning.

Q. Did he laugh and talk with you about his condition in the ditch?

A. No.

Q. He didn't say anything about it?

A. All he said he just said——

Q. I am just asking if he said anything about it, I am not asking what he said.

A. Yes——

Q. And you knew he was in a very bad predicament as far as the car was concerned?

A. Yes.

Q. What was the condition of the back of his car, how was it arranged?

A. Well, just pretty near as bad as the front, only it was down in more soft dirt there.

Q. I mean the condition of it—was the back open or [52] shut, did he have a place in the back you could open up?

A. Yes.

Q. What was the condition of that?

(Testimony of Ralph Harrington.)

A. It was up. He shut it down before I pulled him out.

Q. Did you look into that back part?

A. Not particularly. I just see there was a shovel in there.

Q. Where was the shovel?

A. It was just laying in the back.

Q. What?

A. Laying in the back of the car.

Q. What else did you see in there, if anything?

A. Oh, jack and tools, I suppose—I didn't pay much attention.

Q. You looked at the ground and all you noticed was that particular rock in front.

A. Yes, and a big limb—it really wasn't a limb it was a pole.

Q. That was also under the automobile?

A. Down by the wheel where it would have torn the fender off.

Q. The fender had been torn off? A. No.

Q. I thought you said where the fender had been torn off.

A. I said if I hadn't moved the stick it would have torn the fender off. [53]

Q. The fender on the left on the side of the car going the opposite way than you were going?

A. Yes, he was going the opposite way.

Q. What was the size of that log?

A. Oh, about the size of your arm.

Q. Is that all you did? A. Yes, that's all.

Q. Did you see him do any digging?

(Testimony of Ralph Harrington.)

A. No, that was done when I got there.

Q. So you don't know what he did at all?

A. No.

Q. What was the condition of the wheel on the side closest to the road when you got there—was there anything around that wheel other than this branch?

A. There was nothing there that I seen.

Q. You said your wife was with you.

A. Yes.

Mr. Mack: I believe that is all.

Re-Direct Examination

By Mr. Morey:

Q. Did you, two or three days after this accident, talk to a young man? A. Yes.

Q. Did you know who he was? A. Yes.

Q. Who was he?

A. Heatfield—I don't know his first name. [54]

Q. Did you tell him where this car had been off the road?

Mr. Mack: I object to that as irrelevant and immaterial and hearsay.

Judge Schwellenbach: Objection overruled.

A. As near as I could.

Mr. Morey: That is all.

Re-Cross Examination

By Mr. Mack:

Q. When did you see this young man?

A. Oh, it was two or three days—I don't remember just now.

Q. At your place or on the road?

(Testimony of Ralph Harrington.)

A. He came to my place.

Q. That's how far from this particular place where the car was?

A. Oh, it's three miles anyway.

Q. You are sure you had the right place that you talked to him and you told him where it was as near as you could?

A. As near as I could.

Q. You didn't go with him?

A. No.

Q. How old was this man—what do you think would be his age about?

A. What man?

Q. The man whose car you helped out of the ditch.

A. I would say around sixty. [55]

Q. When you looked at him, just what did you observe?

A. Oh, he just looked tired and wore out.

Q. He looked tired. What do you mean by wore out?

A. Well, he was—well, he had done about all he could do.

Q. He still got in the car and drove the car away. Did you and he joke about it at all?

A. No.

Mr. Mack: I believe that is all.

Witness Excused.

MRS. FLOY HARRINGTON,

a witness called for and on behalf of the Plaintiff,
having been duly sworn, testified as follows on

Direct Examination

By Mr. Morey:

Q. State your name, please.

A. Mrs. Floy Harrington.

Q. You are the wife of the gentleman who was
just on the stand? A. Yes.

Q. You folks are living up on the Curlew-Orient
road? A. Yes.

Q. On June 30th, 1942, where had you and your
husband been? A. We had been in Colville.

[56]

Q. Now, Mrs. Harrington, did you, also, see a
car off the road about two miles from the forest
ranger's camp? A. Yes.

Q. Where was the place with reference to the
forest ranger's camp—east or west of the camp?

A. It was west of the camp.

Q. About how far west?

A. Well, I would say, oh, maybe more than two
miles—approximately two miles.

Q. Approximately two miles? A. Yes.

Q. How far east of Curlew would that point be?

A. About eleven miles, I should judge.

Q. About what time of day did you arrive there?

A. It was about 6:15.

Q. You looked at your watch?

A. Yes—my oldest boy looked at his watch.

(Testimony of Mrs. Floy Harrington.)

Q. What is the character of the country around there?

A. Rough and broken and sand—and quite a few old logs where there had been timber.

Q. Were there any farms within a mile or two?

A. Not any closer than our place.

Q. I wish you would tell the Court and Jury what you observed there. Your first observation of the car and the man. Just give your own observation of it.

A. As I came along—we had to come around quite a sharp corner and just as we came around the corner we noticed this car in the ditch and Mr. Harrington started to pull out [57] in order to offer help and just then a man came out and waved us to stop, and asked us to help him out of the ditch. We stopped then and got out of the car to see if we could pull him out.

Q. I wish you would tell us the physical appearance of the man.

A. Well, it was quite a hot day that day and he seemed quite hot and tired, really exhausted would be my word—he looked like he was all in.

Q. I wish you would tell us his appearance—was he holding his hands in any way?

A. Not right then, but after Mr. Harrington went to turn around to pull him out of the ditch—he was standing there with his hands in front of his body, kind of like this (indicating) and he said he had an awful pain—

(Testimony of Mrs. Floy Harrington.)

Mr. Mack: I object to that, if your Honor please——

Judge Schwellenbach: Objection overruled.

Q. Where did you say he had his hands?

A. Kind of like this as near as I can remember.

Q. About the abdomen?

A. Yes—like this (witness places hands to the left center of abdomen).

Q. All right. Now then, Mrs. Harrington, Mr. Harrington at that time was making arrangements to get the car back on the road.

A. Yes. [58]

Q. You were talking to this man?

A. Yes.

Q. Tell us what he said.

Mr. Mack: Now I object to that, if your Honor please, incompetent, irrelevant and immaterial, self-serving and hearsay.

Judge Schwellenbach: Is it part of the *res gestae*? That is the question.

Mr. Mack: It is not part of the *res gestae*.

Judge Schwellenbach: My offhand impression is it is part of the *res gestae*, and she is entitled to give that part of the conversation. I will be glad to hear from you.

Mr. Mack: If I might do this, if your Honor please: I don't want to waive my rights to it, but I don't care to argue it at this time, unless the Court insists upon it. If the ruling can be reserved.

Judge Schwellenbach: It isn't the kind of testimony I'd like to reserve a ruling on and then ask the Jury to disregard it, so if you want to argue it

(Testimony of Mrs. Floy Harrington.)

now, I will be glad to excuse the Jury for a few minutes and let you argue it.

Mr. Mack: I am more interested in the witness than I am in the Jury, frankly, I am more interested in the witness than I am in the Jury.

Judge Schwellenbach: I don't understand what you mean. [59]

Mr. Mack: It doesn't make much difference whether the Jury hears my argument, or not, but it would be devastating if the witness heard it.

Judge Schwellenbach: Then I will ask the witness to retire.

Mr. Mack: That will be just dandy.

Judge Schwellenbach: The Jury may retire to the Jury room. Mrs. Harrington, will you step outside?

(Discussion.)

Judge Schwellenbach: As to the objection to that part of the testimony which refers to a statement by the deceased as to how he happened to be off the road, the objection is sustained, and Mrs. Harrington will not testify as to what Mr. Heatfield told her about the way the accident happened, that he was pushed off the road by some woman driver. Now she can testify to all other matters. I have a feeling that we have no sufficient proof of the length of time that ensued between the time he was first off the road, if he was, and the time of the conversation to be able to establish if the *res gestae* rule should apply. He was there alone for a considerable period of time. A man might very

(Testimony of Mrs. Floy Harrington.)

well be thinking about what happened. When he started out trying to get his car out of there undoubtedly he wasn't in the physical shape he was in when they came up and I think it may be assumed the physical condition progressed as he worked trying to get the car up on the road. Any person confronted with getting a car out of the ditch very well forms in his own mind a conclusion it was the fault of [60] some woman driver, and such statement might not be a spontaneous one.

The other portion is admissible under the res gestae and under the rule permitting a witness to testify as to the statements made by a deceased person as to his physical suffering.

(Witness Harrington having been brought into the Court Room, was admonished by the Court as follows):

Judge Schwellenbach: You understand, Mrs. Harrington, you can testify as to what he said about having these pains—the first time he had any pains in his heart—but you cannot testify as to what he told you how he happened to go off the road.

Mr. Morey: I appreciate that ruling. It is a very important part of this case for the Plaintiff and I can well realize the Court's opinion in hesitating to let this witness testify to what Mr. Heatfield told her about how he was forced off the road, and solely for the sake of the Record, I want to make an offer by Mrs. Harrington, this witness, to testify that the deceased told her that a woman driver forced him off the road.

(Testimony of Mrs. Floy Harrington.)

Mr. Mack: We except to the ruling of the Court and further object to the offer of proof as irrelevant, incompetent, self-serving and no part of the *res gestae*.

Judge Schwellenbach: The objection to the offer of proof is sustained.

Mr. Mack: I wonder if I understood [61] the Court correctly. I would like to clear it up in my own mind. This evidence is being admitted because a witness can testify as to the suffering which he observed. I agree with that.

Judge Schwellenbach: And as to statements a person makes as to his suffering. I am admitting it on both grounds—part of the *res gestae*, a spontaneous exclamation made at the time with no thought—he didn't know he was going to die and an action be started on accidental death policies, and also, that it was a spontaneous statement as to his physical condition.

(Discussion.)

Judge Schwellenbach: You may ask the witness a question as to what he said—(to the witness) and you tell all but the part as to what he said how his car happened to be off the road.

Q. Tell what he said.

A. Well, as I said, he was holding his hands sort of like that and he said 'I have an awful pain—I have a pain in my heart, the first time in my life I ever had trouble with my heart'. He said it was so hot and he got so tired and exhausted he had to *like* down. He said he had been there an

(Testimony of Mrs. Floy Harrington.)

hour and I asked him if he tried to get his car out——

Mr. Mack: I object to what she said, it is not part of the *res gestae*.

(Objection overruled.)

A. ——and he said, yes he had tried to back up and tried to go forward but he couldn't go either way. He said his car [62] was stuck there and he tried to get it out and he couldn't by himself.

Mr. Morey: I think that is all.

Cross Examination

By Mr. Mack:

Q. You say you had some conversation with this man, and your husband was there at the time?

A. No, he was trying to turn the car around.

Q. What was the conversation, where was the conversation, where was he, what did your husband do with reference to trying to turn the car around?

A. He backed up toward the curve and tried to turn around, but the road was too narrow. While he was doing that, I was standing by Mr. Heatfield's car talking to him.

Q. How far away was your husband then?

A. Well, it was a considerable distance from the curve to the car.

Q. Now, have you told us all you recall of that conversation, or is there anything else you can remember now. You told us all the conversation—how he tried to back the car up and go forward and he couldn't do it.

A. Yes.

(Testimony of Mrs. Floy Harrington.)

Q. And he said he had a pain in his heart and never had any trouble before?

A. That's what he told us.

Q. And he held his hands down here?

A. Kind of like that. [63]

Q. He didn't hold it up here (indicating)?

A. Not that I remember.

Q. And he said he had been there approximately—he said he had been there an hour?

A. He said he had been there for two hours. He said he laid down an hour.

Q. And he had been there a total of two hours?

A. Yes.

Q. And it was a pretty hot day?

A. Yes, real hot.

Q. Did he show you where he was lying down?

A. No, he just said he had been lying down on the side of the road in the shade—there were some trees over there on the opposite side.

Q. What did you see your husband do?

A. He got out and looked at the car and saw it was impossible to get it out without pulling it out. He got down and dug at a rock to move it out of the way so he could get out.

Q. When he was moving the car out where were you?

A. There is a curve, as we said before, we sent the oldest boy up there to watch for cars coming that way, and I went the other way to watch for cars coming that way—we wanted to stop all cars so they wouldn't run into us.

(Testimony of Mrs. Floy Harrington.)

Q. How old is your oldest boy?

A. He is thirteen, will be thirteen the 28th day of this month.

Q. Did he get out of the car? [64]

A. Oh, yes, we took all the children out and put them up on the bank so they wouldn't get hurt.

Q. Was the oldest boy with you when you had this conversation?

A. No, he was watching his father.

Q. Helping his father? A. Yes.

Q. Did you happen to look in the back of Mr. Heatfield's car? A. No, I did not.

Q. But you had the conversation at the back of Mr. Heatfield's car?

A. Standing toward the back, yes—standing there talking.

Q. Your husband hadn't done anything toward pulling the car out.

A. He was trying to turn around so he could pull it out.

Q. He hadn't done anything toward pulling it out?

A. He hadn't hooked onto the car, if that is what you mean.

Q. Was the back of this man's car open or closed? A. I couldn't say.

Q. So that we understand each other—he said he had attempted to move the car forward and move it back.

(Testimony of Mrs. Floy Harrington.)

A. Yes, he had started the motor up and tried to get it up on its own power.

Q. That's about all you recall that Mr. Heatfield said? [65]

A. Yes, as to his condition and what he had been doing.

Q. And about his trouble with his heart.

A. Yes.

Q. How old a man do you think he was?

A. Well, he seemed to be quite an old man—I am not good at judging people's age.

Q. How long were you people there?

A. Oh, twenty minutes, maybe half an hour.

Q. Did you see the gentleman go away?

A. Yes.

Q. Did you go before he did or afterward?

A. Well, as he started to get into his car—before he went to get in his car he asked me if we had any water, he would like to have a drink, and I told him no. I said if he stopped at the forest ranger's camp they would give him a drink, and I told him if there wasn't anybody in the camp, I told him where there was a spring, and asked him if he would be all right, and he said 'Yes', and we watched him drive away.

Q. How far was that forest camp away?

A. Two miles or a little more.

Q. You don't know what he did after that?

A. No, only what I have heard.

Q. You say he looked exhausted—I think you mentioned that word?

A. Yes.

(Testimony of Mrs. Floy Harrington.)

Q. What made you think that—what was his appearance?

A. Well, you can usually tell by looking at a person [66] whether they are tired or look tired, or don't feel good, or overheated, or something.

Q. Just what was he doing, if anything?

A. He was just standing kind of dejected like, like you would if you had been working hard and were overtired, or overworked, or dog tired—overheated.

Q. Did you notice anything about his breathing?

A. Well, not necessarily.

Q. So he was breathing normally?

A. Well, I wouldn't say.

Q. You wouldn't say he was?

A. I wouldn't say he wasn't or I wouldn't say he was.

Q. You were with him quite awhile?

A. I talked to him, yes.

Q. And if he was breathing pretty heavily, you would have seen it.

A. Oh, yes, if he was panting or anything, I would have noticed it.

Q. What made you think he was exhausted if he wasn't breathing pretty hard?

A. Because he looked that way.

Q. What kind of a car was he driving?

A. A black coupe, a Ford.

Mr. Mack: That is all.

Witness excused. [67]

Mr. Morey: I offer in evidence Plaintiff's policy of insurance, exhibit marked for identification, Plaintiff's exhibit B.

Mr. Mack: No objection.

Judge Schwellenbach: Plaintiff's exhibit B admitted.

Mr. Morey: I would like at this time to read a part of this policy to the Jury.

(Reads into the record.)

Mr. Morey: May the record show that Plaintiff's exhibit C is the document marked Plaintiff's exhibit A in the interrogatories, which will subsequently be introduced. And I offer it now in evidence.

Mr. Mack: We object to this for the reason it totally fails to serve any purpose in the case whatsoever. It is incompetent, irrelevant and immaterial and proves no fact or statement or allegation of Plaintiff's complaint whatsoever. If the Court will permit me I will be glad to submit at this time——

Judge Schwellenbach: I don't care to hear further argument on this. The objection is overruled, and exhibit C is admitted.

Mr. Morey: I would like to read this to the Jury.

Judge Schwellenbach: As I understand it, exhibit C is also the same as exhibit A attached to the Complaint.

Mr. Morey: Yes, your Honor. [68]

Mr. Morey: Exhibit C read as follows:

‘July 8, 1942

‘Lamping & Company
250 Colman Building
Seattle, Washington
Gentlemen:

In re. Augustus S. Heatfield
Standard Accident Policy
#97R1387 Renewal number
706997.

‘Assured died near Curlew, Washington, on June 30th. I am attorney for the Estate. He held an accident policy with the Illinois Commercial Men’s Association and the Aetna Life, carrying double indemnity. I was employed by the Executor and the widow, to represent them in the handling of the Estate and also in the matter of collecting on the accident policies. That employment was made on July 1st. It was not until today that I learned that Mr. Heatfield had a policy with the Standard Accident Insurance Company as above numbered, therefore, I must advise you that there will probably be a claim made for payment under your accident policy.

‘The body is being held intact for an autopsy which I intended to have performed on July 10th, until I knew he had this policy with you. If you desire to have an autopsy made or to be represented when the autopsy is taken, and if you cannot make arrangements by July 10th, I think we can hold the body for a day or two longer. In any event, this is your notice that you may have an opportu-

nity to have the autopsy if you desire. I wish you would advise me.

Very truly yours,

HARRY M. MOREY.' [69]

Mr. Mack: Defendant at this time moves to strike exhibit C for the reasons urged to the introduction thereof.

Judge Schwellenbach: Motion denied.

Mr. Morey: I now offer in evidence a document marked for identification Plaintiff's exhibit D, being a letter dated July 30th, 1942, which is the original of Plaintiff's exhibit B attached to the interrogatories propounded to the Defendant, and the original of Plaintiff's exhibit B attached to the Complaint. I offer that in evidence.

Mr. Mack: I object to that as incompetent, irrelevant and immaterial and sustains no allegation of the complaint. This is dated July 30th. It is not sworn to. I am at a loss to understand it. He contends it is a notice of some kind. It is clearly too late for the ordinary notice. If he contends it is a proof of loss it does not comply with the requirements. It is just a statement in a letter dated July 30th and it could not in any event be any proof of anything in this case. I don't know what the purpose of it is.

Judge Schwellenbach: The objection is overruled, it will be admitted. And the Jury is instructed with reference to this exhibit, and the last

exhibit that was admitted in evidence not as proof of what they say—they are statements made by Mr. Morey and are admitted under the provisions of the policy requiring certain notice to be given and you will consider them for that purpose [70] only. The mere fact that certain statements made in there is not proof the statements are true of the way in which the thing occurred, but are admissible as notice only, and not as proof of facts as alleged.

Mr. Morey: I will read this.

‘July 30, 1942

‘Standard Accident Insurance Company
Detroit, Michigan

Gentlemen:

Re: Accident policy of

Augustus S. Heatfield 97R-1387

‘I represent Thomas A. Heatfield, Executor of the Estate of Augustus S. Heatfield, and his widow.

‘Augustus S. Heatfield, died near Curlew, Washington, on June 30th, 1942. It seemed that he was driving his automobile on a mountain road between Curlew and Colville, Washington. An automobile approaching from the opposite direction crowded him off the road so that the right wheels of his car were down over the bank. Mr. Heatfield was alone at the time of the incident and immediately attempted to get his car back on the road. In so doing he greatly over exerted and strained himself. Finally another motorist towed or pulled his car down the road and Heatfield then drove to a forest ranger camp where he got out of the car to get some water. Later the attendants at the camp heard

a call for help and found Heatfield stretched out on the ground near his car. They took him into camp and put him to bed and the next morning it was discovered that he had died.

‘It is the contention of the Executor and widow that [71] the above incidents establish a claim in accordance with the provisions of the above described policy, and claim is hereby made on you for payment of \$7500, face value of the policy. On July 8, 1943, I wrote Lamping & Company in Seattle, advising them that Heatfield had died and that claim would probably be made under the policy and that we intended to have an autopsy and giving an opportunity to the company to have an autopsy or to be present at the one we were making. Autopsy was held on July 10, 1942. Dr. Peter Reid attended the autopsy in your behalf. There were four persons interested in the making of the autopsy, the widow, the Illinois Commercial Men’s Association, the Aetna Insurance Company and your company. The Pathologist’s fee was \$50. I had an agreement with the Aetna and the Illinois Commercial Men’s Association that the Pathologist’s fee would be divided between us and just before the autopsy was performed I was informed Mr. Mr. M. E. Mack was representing your company. Mr. Mack had no definite authority from you but he indicated that the Standard Accident Insurance Company would pay its share of the Pathologist’s fee. Therefore, at the proper time, I will ask you to reimburse me in the sum of \$12.50.

‘Will you please forward such proof of loss forms as you may require?’

Very truly yours,

HARRY M. MOREY.’

Mr. Mack: I move to strike this for the same reason as to the first one, self-serving declarations. [72]

Judge Schwellenbach: The same ruling.

Mr. Morey: Mr. Mack, have you found the original proof of loss? Will you stipulate this is a copy?

Mr. Mack: We have no objection to any copy. I have mislaid it somewhere. I thought I had it somewhere.

Mr. Morey: I thought you did, too.

Whereupon: Copy marked Plaintiff’s exhibit E for identification.

Mr. Mack: If the original is found it may be substituted.

Mr. Morey: Let the record show I am now offering in evidence a document marked for identification ‘E’ which is a copy of exhibit C attached to the Complaint.

Mr. Mack: I have no objection to that.

Judge Schwellenbach: It may be admitted.

Whereupon: Plaintiff’s exhibit E, proof of loss, read into the record.

Judge Schwellenbach: The Jury will understand this is in the same category as the last two exhibits. The policy provides that proof of loss must be submitted, and it is admitted solely for the purpose of

submitting proof to the effect that such proof of loss was filed. It is not proof of any of the facts set forth and should not be considered by you as proof of any of *the* [73]

Mr. Morey: I have some interrogatories—do I have these marked as an exhibit?

Judge Schwellenbach: Those interrogatories do not go in as an exhibit.

Mr. Morey: Then I will read them.

Judge Schwellenbach: You can have Mr. Mack read the answers and you read the questions.

Mr. Morey: This document is called 'Interrogatories propounded by the Plaintiff to the Defendant and to be answered by the Defendant or any officer thereof, competent to testify as a witness in its behalf. The answers to be made, signed and sworn to, and returned and used at the trial of the above entitled action as provided by the statutes of the United States and the rules of the Federal procedure.'

Interrogatory No. 1. I will ask the person who makes answer to these interrogatories to state his name, age and his official capacity with the Standard Accident Insurance Company of Detroit, Michigan.

The said interrogatories may be answered by Mr. M. E. Mack for and on behalf of the Defendant with the same force and effect as though answered by an officer of the Defendant and the same may be used in evidence by either party to this proceeding and interrogatory No. 1 thereof need not be

answered. February 19, 1943. Signed by both Counsel.

Interrogatory No. 2. Is it not a fact that Lamping and Company, a corporation, was on June 30th, 1942, and ever since that date has been an authorized agent of the [74] Standard Accident Insurance Company of Detroit, Michigan. A. Yes.

Interrogatory No. 3. If you have answered interrogatory No. 2 in the negative and if Lamping and Company has been named authorized agent of the Standard Accident Insurance Company of Detroit, Michigan, since June 30, 1942, please state the date on which it was made such authorized agent.

A. No answer.

Interrogatory No. 4. Is it not a fact that on June 30th, 1942, and ever since that date Lamping and Company had one of its offices in the city of Seattle, Washington? A. Yes.

Interrogatory No. 5. Is it not a fact that the original or copy of a letter, of which the attached copy marked exhibit "A" is a true copy of the substance and words used, and has been received at the home office of the Standard Accident Insurance Company of Detroit, Michigan?

A. It is a true copy of the words used and a copy thereof was received by the Defendant at its home office Detroit, Michigan, July 20th, 1942.

Interrogatory No. 6. If you have answered interrogatory No. 5 in the affirmative, is it not a fact that Lamping and Company of Seattle, Washington, sent the home office the original or copy of said letter?

A. A copy of said letter was received at the home office of the Defendant company July 20th, 1942.

The Court: That exhibit "A" refers [75] to exhibit "C" in evidence here.

Mr. Morey: Yes.

Interrogatory No. 7. If you have answered interrogatory No. 5 in the affirmative, please state the date on which the original or copy of said letter was received at the home office of said Defendant company.

A. A copy of said letter was received at the home office of the Defendant company July 20, 1942.

Interrogatory No. 8. Is it not a fact that the original of a letter of which a copy marked exhibit "B" is a true and correct copy of the substance and words used, was received at the home office of the Defendant company?

A. The original letter marked exhibit "B" is a true copy of the words used and was received at the home office of the Defendant company, Detroit, Michigan, August 3, 1942.

Interrogatory No. 9. If you have answered interrogatory No. 8 in the affirmative, please state the date said letter was received.

A. August 3rd, 1942.

Interrogatory No. 10. Will you please attach the exhibits "A" and "B" that are attached to these interrogatories to your answers to the interrogatories? A. Yes. [76]

Mr. Morey: At this time I ask that the Deposi-

tion of Thomas A. Heatfield be published, opened and published.

Judge Schwellenbach: Very well, it may be published. Was this taken on notice or stipulation?

Mr. Morey: This was taken on notice. The notice is attached to the Deposition. I think it is proper to read the notice at this time.

Judge Schwellenbach: Is there any question as to the method of taking the Deposition?

Mr. Mack: No, I think not, it is in the usual form. Any objections may be made here at the trial.

Judge Schwellenbach: Do you stipulate the questions and answers may be read without reading the notice?

Mr. Mack: That is correct.

Deposition of

THOMAS A. HEATFIELD

Being duly cautioned and sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination by Sugarman:

Q. What is your name?

A. Thomas A. Heatfield.

Q. Where do you live?

A. 1556 Merced Street, Richmond, California.

Q. Mr. Sugarman: I suppose it will be stipulated that that is over one hundred miles from the place of action. [77]

(Deposition of Thomas A. Heatfield.)

Mr. Mack: That is all right.

Q. You are the son, are you not, of Augustus S. Heatfield, is that correct? A. Yes.

Q. What was your father's occupation?

A. He was a representative of the Hanover Fire Insurance Company.

Q. Just briefly, Mr. Heatfield, what did he do?

A. His work consisted of supervising local agents of the company.

Q. And for that purpose was it necessary for him to do any manual labor of any form?

A. No.

Q. When did you last see your father?

A. About January 19, 1942.

Q. And where was it that you saw him?

A. At Coulee Dam, Washington.

Q. Did you have an opportunity at that time to observe the state of his health, his general appearance?

Mr. Mack: To which we object as incompetent, immaterial and irrelevant. The state of his health January, 1942, does not establish his condition in June of 1942, or June 30th.

Judge Schwellenbach: Do you intend to connect this up by further testimony as to the condition immediately prior to June 30th?

Mr. Morey: No, not immediately prior. I don't know why Mr. Sugarman asked that question, to be [78] perfectly frank with the Court. I think I will have other evidence showing the general

(Deposition of Thomas A. Heatfield.)

health of Mr. Heatfield, probably a year prior to this event——

Judge Schwellenbach: If you connect this up from time to time to just before the time he died, it is competent, but if you just leave this witness and no other testimony, then I think the objection is well taken. A lot of things can happen between January and June.

Mr. Morey: I think at this time I would like to have it go in with the understanding I intend to offer some evidence of his condition up to the time he died.

Mr. Mack: It doesn't make any difference what he intends to do—this man isn't competent to testify.

Judge Schwellenbach: What about?

Mr. Mack: He asked him what his condition physically was on a date, in January, 1942, and that has nothing to do with what occurred in June.

Judge Schwellenbach: The objection is overruled.

A. Well, he stayed with us a day and a night, yes.

Q. And what was the state of his appearance?

Mr. Mack: The same objection.

Judge Schwellenbach: The same ruling.

A. He seemed perfectly normal to me at that time.

Q. Now, how old was your father when you last saw him? [79]

A. He was sixty-five, I believe.

(Deposition of Thomas A. Heatfield.)

Q. And do you *know* he was when he died?

A. He was still sixty-five.

Q. What was the date of your father's death?

A. June 30th, 1942.

Q. After your father died—you went up to the State of Washington when he died, did you not?

A. Yes.

Q. And did you at that time go to the vicinity of the city of Curlew, Washington. A. Yes.

Q. Now what was the reason that you went there?

A. I went there to recover his personal property that had been with him at the time of his death and to investigate the evidence of his death.

Q. Now what day was it when you arrived in that vicinity? A. It was July 3rd.

Q. 1942? A. 1942, yes.

Q. Did you have an opportunity at that time to visit the Curlew-Orient highway, or roadway?

A. Yes, I drove over that road.

Q. By the Curlew-Orient road, I mean, of course, the road that connects those two cities in Washington. What kind of road is that?

A. It is a narrow, crooked, mountainous road.

Q. Is it a dirt road? A. Yes. [80]

Q. Not paved? A. Not paved.

Q. I want to refer especially to the portion of that road which is about eleven miles from Curlew, the point which I think we can refer to as where your father—I will withdraw that question. Just

(Deposition of Thomas A. Heatfield.)

refer to it as eleven miles from Curlew, how wide is it?

A. I would say probably twelve or thirteen feet.

Q. And did you have an opportunity to observe a place along the road at about that spot where there were automobile tracks that went off the road?

Mr. Mack: To which I object as irrelevant, incompetent and immaterial, unless it is shown it has some connection with this particular automobile. If he found tracks there on a road eleven miles long, doesn't prove a thing.

The Court: I will reserve a ruling on that question. Maybe we better wait until we get the authorities I have sent for.

(Discussion.)

The Court: Do you intend to call Dan Abraham?

Mr. Morey: No, your Honor, Mr. Abraham is down in Missouri, in the Army. I will call a witness from the forest service station, who knows what was said.

The Court: I will sustain an objection of the testimony of this witness until such time as you can connect it up with the place. You said you intended [81] to call some forest ranger, from the forest ranger station. There are one or two questions you might pick out and put in afterwards if I do sustain the objection throughout.

Mr. Morey: Very well, your Honor. May I ask at this time the Deposition of W. T. Selbach be opened and published?

The Court: May we have the same stipulation waiving any formality as to the notice?

Mr. Mack: As to the notice, I certainly will, if your Honor please. I think it might be well at this time, if the Court would indulge us, we will certainly finish the case tomorrow anyway, I would like to be heard to see if I understand, myself, just what this thing is all about. I might make it clearer. The allegations of the Complaint and the statement of Counsel definitely was that the notice was given within the twenty days provided by this policy. The rule unquestionably is if they have not done that and without some way of exonerating or excusing it, they cannot recover. There is no deviation from that rule. Now, he comes back and says in his reply the reason he didn't give that notice within the twenty days was because they didn't have the policy, didn't know the terms of the policy and therefore, somebody—must have been the Defendant—waived it. If they are not inconsistent statements they are very much on the border line. He says he didn't give that notice and now he wants to prove to the Court the reason he didn't give the notice because there was a condition in the policy, [82] the terms of which they didn't know, although they knew all about the policy. I say, if your Honor please, that establishes certainly this position, it's an admission, a very definite admission, that the twenty-day notice was not given and then he attempts to prove now why that was overlooked without any allegation of necessity for that excuse, and I *don't* this Deposition is admissible for any

purpose except the purpose it is now an admission on the part of the Plaintiff they didn't give this notice. They are bound by that admission and it will not avail them now to attempt to introduce evidence that they did not have the policy.

The Court: You are objecting to the introduction of this testimony?

Mr. Mack: Yes sir.

Mr. Morey: May I be heard on that?

The Court: No. I will overrule the objection.

Mr. Morey: In view of the fact that the statement by Mr. Mack was made in the presence of the Jury, however, I do wish——

The Court: You want to make an argument to the Jury, too?

Mr. Mack: That wasn't my purpose.

Mr. Morey: Anyway, that argument can come in when we are entitled to argue it.

The Court: If it is a question for the Jury to pass upon as to the effectiveness of this notice, they will be instructed with reference to it and have [83] an opportunity to pass on it.

Mr. Morey: Now, then, Mr. Mack, may the Deposition be read?

Mr. Mack: That is up to the Court.

The Court: I ruled that it could be read, yes.

Mr. Morey: I believe you stipulated this was taken on notice.

Mr. Morey: (Reading from Deposition)

'Be it remembered, that on April 2nd, 1943, at 10:00 o'clock, A. M., pursuant to written notice dated March 18, 1943, which is attached hereto, per-

sonally appeared before me, Emma L. MacHugh, a Notary Public in and for the City and County of San Francisco, State of California,

W. T. SELBACH

a witness called on behalf of the Plaintiff, who deposed in answer to written interrogatories attached to the notice as follows: Interrogatory No. 1. Please state your name, age, and business or profession.

‘A. Answering interrogatory No. 1 witness testified as follows: William Taylor Selbach, age 33, insurance general agent, employe of Selbach & Deans.

‘Interrogatory No. 2 was August S. Heatfield an employe of Selbach & Deans on June 30th, 1942?

‘A. Mr. Augustus S. Heatfield was an employe of Selbach & Deans up to the time of his death, which occurred I believe sometime on June 30th, 1942.

‘Interrogatory No. 3 Where was your business office on June 30th, 1942?

‘A. 340 Pine Street, San Francisco, California.

[84]

‘Interrogatory No. 4. Did you go to Spokane, Washington, subsequent to June 30th, 1942? If so, give the date that you arrived in Spokane.

‘A. Yes. Arrived in Spokane on or about the 10th day of August, 1942.

‘Interrogatory No. 5. What was the purpose of your visit to Spokane?

(Deposition of W. T. Selbach.)

‘A. I came to Spokane to take over the affairs of Selbach & Deans and to hire a successor to Mr. Heatfield.

‘Interrogatory No. 6. Did you make a search of the desk that Augustus S. Heatfield had used in his business?

‘A. It took em about 10 days to go through all files and segregate all Mr. Heatfield’s personal property from that of our business and among other things I came across an accident policy made out in Mr. Heatfield’s name issued by Standard Accident Insurance Company of Detroit, Michigan, and which was stuck in a pigeon-hole in Mr. Heatfield’s desk among miscellaneous papers.

‘Interrogatory No. 8. Please state what you did with that policy after it came to your attention.

‘A. Upon discovery of the policy, I telephoned Mrs. Heatfield and told her I found the policy and she suggested I turn it over to Mr. Morey, her attorney. The exact date I turned the policy over to Mr. Morey, I do not recall, but it was sometime during the latter part of August, 1942.

‘(signed) W. T. SELBACH [85]

‘State of California,
City and County of San Francisco—ss.

‘I hereby certify that on the second day of April, 1943, at 10:00 o’clock A. M., before me, Emma L. MacHugh, a Notary Public in and for the city and county of San Francisco, State of California, in the lobby of the building at 233 Sansome Street, San Francisco, personally appeared W. T. Selbach,

pursuant to written notice dated March 18, 1943, a witness called in behalf of Plaintiff to answer written interrogatories attached thereto.

‘I further certify that the witness was first duly cautioned and sworn to testify to the truth and the whole truth and nothing but the truth and that the Deposition was written out and submitted to the witness for examination and was read and signed by him and that the Deposition is a true record of the testimony given by said witness.

‘I further certify that the said Deposition has been retained by me for the purpose of sealing it in an envelope and directing the same to the Clerk of the above entitled Court as required be law.

‘I further certify that at the time of the taking of the Deposition the witness was in the City of San Francisco, State of California, and outside of the District where the above entitled action is being tried and more than one hundred miles from the place of the trial, and that I am not a relative or an employee, or attorney, or counsel for any of the parties, or relative or employee of such attorney or [86] counsel and am not financially interested in the action.

‘In witness whereof I have hereunto set my hand affixed my seal of office, this second day of April, 1943.

‘(signed) EMMA L. MacHUGH
Notary Public in and for the City and County of
San Francisco, State of California, my commission expires January 15, 1944.’

Mr. Mack: Defendant at this time moves the Court to strike all the testimony appearing in the Deposition, or, in the event that is not done, the Plaintiff be made to elect on whether or not this case is based on having given notice or whether it is based on E. (5) which appears in the Complaint as reason or excuse for failure to give that notice. These provisions are diametrically opposed. I can't say it any clearer. Either they have given notice correctly or they have not and they should now be required to.

The Court: This motion raises the same question raised by the objection made prior to the reading of this Deposition. It raises, first, a question of pleading. It is undoubtedly true the Plaintiff in his Complaint did not plead the excuse for the failure to give notice within the twenty-day period. The theory on which the Complaint is based is that notice was given within the twenty-day period. However, in the answer the Defendant stands on the affirmative defense that no such notice was given and by way of reply the allegations of which this Deposition is introduced to support was inserted in the pleadings under the [87] liberty allowed under the new rules of Federal procedure by which it may be possible for Counsel for Plaintiff right now to amend his Complaint by inserting these allegations. I see no reason why I should sustain the objection on the ground of the pleadings. It is in the pleading as part of the reply to the affirmative defense. Then you come to the second question as to the admissibility of the testimony

itself. The policy requires that notice be given within twenty days. This death is alleged to have occurred June 30th, 1942. Now it is the contention of the Plaintiff here that notice was given July 8, 1942, within twenty days. I am not passing on the question whether or not that was sufficient notice, or whether it is a question of fact sufficient to be submitted to the Jury. However, if that notice of July 8th, 1942, was not sufficient notice it is a nullity, then the other provision of the policy which makes it possible to serve notice after the expiration of twenty days becomes effective, and on the basis of that this testimony is offered as an excuse. Whether or not it is sufficient excuse, whether that is a question of law to be decided by the law, or a question of fact, to be determined by the Jury, I am not at this point able to determine. But it is admissible evidence under the allegations of the reply. There is nothing inconsistent between the two. Plaintiff alleges she served notice on July 8th. If I decide as a matter of law that was not sufficient notice or should decide as a matter of fact it was not sufficient notice, then she may offer testimony as to the notice of July 30th, 1942. For those reasons I overrule the objection and deny the motion to strike. [88]

Whereupon: Court adjourned, to convene at 10 A. M., April 15, at which time, all parties present, the trial resumed.

THOMAS A. CALLAN,

a witness called for and on behalf of the Plaintiff,
having been duly sworn, testified as follows, on

Direct Examination

By Mr Morey:

Q. State your name, please.

A. Thomas A. Callan.

Q. Where do you live?

A. At Boyds, Washington.

Q. Where is Boyds?

A. About thirty-two miles north of Colville.

Q. What were you doing up there?

A. I work for the forest service during the summer, that is, most of the summer.

Q. In the winter time, you do what?

A. I stay at home—I worked out all winter at the * * * plant.

Q. Do you have your own place up there?

A. Yes, sir.

Q. A small farm? A. Yes.

Q. Are you married? A. Yes.

Q. How long have you lived up there?

A. About all my life.

Q. On June 30th, 1942, I take it you were working at the forest service camp. [89]

A. Yes, sir, I was.

Q. On what road is that?

A. Between Curlew and Kettle Falls.

Q. All right. Another point on that road is Orient. A. That's right.

Q. It is sometimes the Curlew-Orient road.

A. It is.

(Testimony of Thomas A. Callan.)

Q. Your camp was where with relation to the summit? A. Right on the summit.

Q. How many men were in your camp at that time?

A. Well, at that time only four besides myself.

Q. On that day, June 30th, 1942, did a gentleman call at your camp in a black Ford coupe?

A. Yes, he did.

Q. What time of day was it?

A. It must have been 6:30.

Q. And was he alone? A. He was alone.

Q. Just tell the Jury what happened from the time you first saw him from then on.

A. Mr. Mack: I object to that unless he limits him to what he saw. I have no objection to what he saw but any statements made at that time will be incompetent.

Q. I am not asking you to recite any statements, simply what you saw this gentleman do. I will ask you now to refrain from making any statements as to what this man made to you. [90]

A. This gentleman came to the camp and asked for a drink of water. We gave it to him and asked him to stay overnight. Well he seemed to want to go to his car which was about a hundred yards from where the camp was. We told him if he didn't feel well to call us and so he did and we went down and got him——

Q. Just a moment, when you got to the car where was he then? When you heard him call, where was he then?

(Testimony of Thomas A. Callan.)

A. He was lying down.

Q. Where was that with reference to his car?

A. His car was on the main road and we were off just a little.

Q. Which way was the car headed at that time?

A. Toward Orient.

Q. And you saw him where?

A. He was lying down beside the car.

Q. Then what did you do?

A. We helped him in the car and one of the boys drove the car up to the tent and then we unloaded him, helped him get out.

Q. Tell us something about his physical appearance at that time.

A. Well, he was sick——

Mr. Mack: I move to strike.

The Court: Motion denied.

Q. All right. He was sick, you say.

A. Yes, sir.

Q. How was he sick? [91]

Mr. Mack: I object to that as calling for an opinion of this witness.

The Court: Anybody knows whether a person is sick or not. You don't have to be a doctor, the objection is overruled.

Q. What was he doing?

A. He was trying to throw up.

Q. I see. Then what did you do with him?

A. Well, we fixed him a bed and helped him to lie down. We told him if he needed anything—if he needed any help, we would help him.

(Testimony of Thomas A. Callan.)

Q. Did you help him retire that night?

A. Yes, we did.

Q. On a cot, or where? A. On a cot.

Q. What time do you think you, personally, retired that night, what time did you go to sleep?

A. About 10:30.

Q. Had this man been talking to you up until that time? A. Yes, most all the time.

Q. What was his physical condition or his appearance after he went to bed there?

A. He seemed to be sick. He thought he might be better, but he was still sick.

Q. The next morning, what did you find?

A. Well, he was dead.

Q. Did you see him dead, there? [92]

A. Yes, sir.

Q. Was there a man by the name of Abraham at the camp at that time?

A. Yes, sir, there was.

Q. Did you personally see young Heatfield?

A. I just met him is all, on the road, we passed each other.

Q. You didn't talk with him?

A. No, I didn't know him.

Q. Was Abraham at the camp at the time you passed this Mr. Heatfield on the road?

A. Yes, he was taking care of the camp.

Mr. Morey: That is all.

Cross Examination

By Mr. Mack:

Q. This gentleman drove up about what time, would you say?

(Testimony of Thomas A. Callan.)

A. About 6:30 in the evening.

Q. Did you look at your watch at all to check up on the time?

A. No, I didn't, but we just got through eating supper.

Q. You had just finished supper?

A. Yes.

Q. Do you know what time you started?

A. We generally started about 6:00 o'clock.

Q. Did you give him something to eat?

A. No. [93]

Q. When he came up to your camp was he walking? A. Yes, he was.

Q. How far was the camp from the road?

A. It must have been about a hundred yards.

Q. Did you see him walking to the camp?

A. Yes.

Q. You saw him walking before he reached the camp. A. He walked from the car.

Q. Did you observe him walking as he came?

A. I didn't see him until he got right close to camp.

Q. You saw him walking after that?

A. Yes, I saw him walk down to his car, or that way, started toward his car.

Q. How long was it after he had come to the camp approximately?

A. When he went to the car?

Q. Yes.

A. He didn't stay very long at the camp.

(Testimony of Thomas A. Callan.)

Q. You say he didn't stay very long, will you try to fix the time, please sir?

A. Well, I would say ten minutes, or fifteen, somewhere around there.

Q. You saw him leave your camp from the highway? A. Yes, sir.

Q. Just how did he walk, please?

A. Well, he was stooped over like he was sick.

Q. His head was bent, you mean—back was bent?

A. Yes, just stooped over like a sick person.

[94]

Q. Did you hear him make any noise or remarks from the time he left the camp until he went to the highway?

A. Other than he was sick, he said.

Q. As he went from your camp to the highway, did you hear him say anything after he left your camp for the highway?

A. Between the highway and the car?

Q. Between the camp and the car. After he came there and got a drink of water, you gave him a drink of water you say. A. Yes.

Q. Then he left in about ten minutes.

A. Yes.

Q. And he went from the camp back to the highway? A. Yes.

Q. Now as he went from the camp back to the highway, did you hear him say anything, did he say anything to you at all?

(Testimony of Thomas A. Callan.)

A. Yes, he said he was sick, then he started out.

Q. Between the camp and the highway, you didn't hear him say anything?

A. No—he had started to walk as he said this.

Q. How long was it after he left the camp that you heard the call?

A. Well, I would say probably half an hour.

Q. When you got up there after that, you saw him lying somewhere on the ground, or something.

A. Yes, sir. [95]

Q. He wasn't in his car?

A. No, he was on the ground.

Q. Was the car on the main highway?

A. No, just off on the curve a little bit, kind of a little side road is what it was there.

Q. Then he was lying how close to the car?

A. Must have been twelve feet or so.

Q. To the front of the car or the back?

A. No, to the side of it.

Q. What was he lying on?

A. He was lying on the ground. He had a small pillow or something there.

Q. That was under his head was it?

A. Yes, it was.

Q. What kind of a noise did you hear? this hundred yards away?

A. Well, we heard him because we were listening.

Q. What did you hear?

(Testimony of Thomas A. Callan.)

A. He just hollered like a person that wanted help.

Q. You don't recall what he hollered?

A. No, no word or anything, he just hollered.

Q. Once, or twice, or don't you know?

A. Just once.

Q. As I understand you you listened for half an hour to hear?

A. I didn't take out my watch, it was near that sometime—we were up there where we could see down.

Q. Were you outside the camp or inside the camp? [96] A. We were out in front of it.

Q. All this half hour?

A. Well, we were going back and forth, some of us were out all the time.

Q. You didn't know at the expiration of the half hour, or when he hollered, you didn't know but what he had gone on?

A. We knew he hadn't gone, the car was there. We could see the top of the car.

Q. Then you brought him back to the camp—drove him back to the camp. A. Yes, sir.

Q. Just how was that done?—Did you back the car up? A. Yes.

Q. How did you put him in the car?

A. We just took hold of him and helped him in the car.

Q. Did he sit in the front or back seat?

A. There was just one seat.

The Court: It was a coupe.

(Testimony of Thomas A. Callan.)

Witness: A coupe, yes.

Q. Do you remember who drove that coupe?

A. I don't know right now, but I think it was Jack Price that did.

Q. When you got to the camp just what did you do?

A. Well, we helped him out and he tried to throw up.

Q. Did he vomit?

A. He was trying to vomit.

Q. Did he or not? [97]

A. Very little, if any.

Q. How long before you put him to bed?

A. Well, we put him to bed as soon as he got done vomiting.

Q. Which would be very shortly after you got him back to camp? A. Yes.

Q. Did you have to undress him?

A. Well we took off his shoes.

Q. He undressed himself the rest of the way?

A. No, he didn't—he just kept his clothes on.

Q. All of them? A. All but his coat.

Q. Who took that coat?

A. He had it off already.

Q. Did you have to make up this cot?

A. We just had to get a clean blanket and everything.

Q. How far did you go to get those?

A. Just a little ways to the cookhouse.

Q. What did you do about helping him on the cot, if anything?

(Testimony of Thomas A. Callan.)

A. Just took hold of him and helped him on the cot.

Q. All three of you?

A. No, I don't remember which one of us did, but we helped him on the cot.

Q. Did he ask for anything else besides water?

A. No, that was all he wanted just water.

Q. Are you certain of that? [98]

A. He asked if we had a stimulant of some kind, but we didn't.

Q. He asked for a stimulant?

A. Ammonia, or something so he could smell it.

Q. What did he say about whiskey, anything at all?

A. He said he wasn't a drinking man.

Q. Did he ask for whiskey?

A. I don't believe he did.

The Court: Is there any evidence to be submitted by either side—is there any whiskey involved?

Mr. Mack: No, no.

Q. During the time he was on the cot, after he lie down in the situation he was, you talked to him?

A. Yes I talked to him.

Q. Most of the time until you went to sleep, 10:30 or 10:00 o'clock.

A. Yes.

Q. He carried on a conversation with you?

A. Well if I would ask him a question, he would answer me, that is about all.

Q. Did he tell you what his business was?

(Testimony of Thomas A. Callan.)

A. Yes, I believe he did. I am not so sure. I think he did though.

Q. What business did he say he was in if you recall?

A. No, I don't really recall that part. I wasn't interested in his business so much right at that time.

Q. Did he do any voluntary talking? [99]

A. Not very much.

Q. The other boys were also there.

A. Yes, they were there.

Q. Did they talk to him too?

A. No not very much; they might have said a word; I don't remember as to that.

Q. Was he asleep when you went to sleep, if you know? A. Well I thought he was.

Q. Did you hear any noise or anything that night that woke you up? A. No.

Q. Everything was very quiet from the time you went to bed and the last remark he made to you, you thought he was asleep until the next morning.

A. That's about the way it was all right.

Q. You told him if he needed any help to call you, or something? A. That's right.

Q. He didn't do it?

A. No he didn't say anything.

Q. You think that you finished the conversation with him between 10:00 and 10:30?

A. About that time.

Q. And you told him that after you finished the conversation with him?

(Testimony of Thomas A. Callan.)

A. I told him that two or three times.

Q. What did he reply? Did he need any help?

A. He said he had never been sick and he thought he [100] would be all right.

Q. You didn't wake up yourself during the night? A. No I did not.

Q. What time did you wake up the next morning?

A. Well, it must have been a quarter to seven, I judge. It never looked at my watch.

Q. How far was his cot from where you were sleeping, about how far?

A. Oh it must have been twenty feet or so. Twenty-two maybe. In a big tent.

Q. Approximately the same distance from the other boys? A. Yes just about.

Q. You were all in the same tent. A. Yes.

Mr. Mack: That is all.

Re-Direct Examination

By Mr. Morey:

Q. Did this man say anything to you about any work he had done down on the road?

Mr. Mack: I object to that as incompetent, irrelevant and immaterial, self-serving declarations, hearsay—not having been established as part of the *res gestae* and not a statement of fact.

Mr. Morey: Counsel on Cross Examination asked this witness what was said, in other words he invited it, and I believe under the rules I am entitled to follow that up and find out what was said. [101]

(Testimony of Thomas A. Callan.)

The Court: I think you are entitled to ask him as part of the *res gestae* any part of the conversation which might refer to his physical condition or any *exclamation* he might make as to the reason for his physical condition. I will put the same limitation on this witness as I did on Mrs. Harrington yesterday. The objection is overruled.

(Question Read.) 'Did this man say anything to you about any work he had done down on the road?'

A. Yes he said he had over-exerted himself.

Mr. Mack: I move to strike that as a conclusion of Mr. Heatfield and not as a statement of fact.

The Court: Motion denied.

Mr. Morey: That is all.

Mr. Mack: That is all.

Witness Excused.

Mr. Morey: May it please the Court, I would like to pursue this Deposition at this time, if I may. I have a doctor coming who promised to be here at 10:30——

The Court: You had better do a little arguing first. I don't think you have furnished anything further——

Mr. Morey: I understood the Court to say yesterday there were some parts of this Deposition that might be admitted, that was my understanding.

The Court: Yes, there are a few questions in there. I sustained an objection on the [102]

ground there was no identification by this witness as to the place which he testified as being the place about which the Harringtons testified. He said it was about eleven miles away from Curlew—now if you want to go through this Deposition——

Mr. Morey: I hardly see the necessity of that, just so I understand the Court and I don't want to impose on the Court. Now I understand the Court's ruling to be there is no evidence to show that this witness had any knowledge of where this accident happened.

The Court: Yes. The objection was made by Mr. Mack on the ground it was too remote as to time. I am satisfied on that question that that is a question to go to the weight of the testimony rather than its admissibility, as to time. Now as to the identification as to the place—here you have a rather indefinite testimony as to the place—about eleven miles—the young Mr. Heatfield who went up there a few days after that and he testified he went up to the camp and somebody sent him out and he saw a certain place on the road and attempts to testify as to marks there. I don't think it's sufficiently identifies the place, Mr. Heatfield said he saw as being the place. That's the trend of my ruling—not remoteness as to time but indefiniteness as to location.

Mr. Morey: I now respectfully ask to call the Court's attention—the Court may have overlooked it—but you will observe this witness testified as he went along there about eleven miles out of Curlew, he [103] *he* watched particularly to see whether

he could see any signs of a car going off the road. He got up there, and except for some inquiries he made from this man Abraham, he didn't know the exact point—I do think we are in a difficult position there and I do think the Court ought to give all the weight possible to what he said as to the manner of locating it. I wish to say further, if the Court thinks it would be material, that this witness later on in this Deposition has identified—and it's attached to the Deposition a picture which is a similar picture to the one Mr. Harrington took.

The Court: Well, let's see that——

Mr. Mack: Mr. Harrington was asked if that was the approximate representation of the place or the road——

The Court: I will overrule the objection. This exhibit C is the same picture that was identified by Mr. Harrington.

Mr. Mack: Might I make this further observation? I took this exhibit and asked this man——

The Court: Remember it goes to the weight of it. The Jury will have to pass on the weight of the testimony. I will overrule the objection.

Mr. Morey: Then I will continue the reading of the

DEPOSITION OF TOM HEATFIELD

'Q. And did you have an opportunity to observe a place along the road at about that spot where there were [104] automobile tracks which went off the road. A. Yes.

(Deposition of Tom Heatfield.)

Q. You examined that place, did you not?

A. Very carefully.

Q. You knew, did you not, that that was where your Father had gone off the road? A. Yes.

Mr. Mack: I object to that is simply the view of this witness and not a statement of fact.

The Court: Objection sustained. Let the record show the Defendant objects to all of this testimony by Mr. Heatfield. This question you should specifically object to. But your general objection will go to all of this testimony and is admitted over your objection.

Q. Will you tell us just briefly, Mr. Heatfield, what you saw at that place.

A. There were very distinct marks there at that time where a car had been in the ditch. There were deep tire marks where the car had regained the road, the marks being alongside the shoulder of the road.

Q. Which side of the road with reference to compass directions were these marks?

The Court: I think I will instruct the Jury to disregard that last part insofar as the witness said 'Where the car had regained the road'. That is purely a conclusion of the witness and not admissible. The witness is entitled to testify to what he saw. Of course in my [105] instructions I will instruct the Jury as to the care it must use in appraising and analyzing this testimony. I might as well do it now.

In a case where the situation necessarily makes

(Deposition of Tom Heatfield.)

difficult the presentation of proof, the strict rules of evidence are relaxed to the extent it is proper to submit to the Jury testimony. The Jury must realize that this testimony is submitted as a part of a chain of circumstances in order to prove an ultimate fact and the Jury must appraise this testimony carefully. The weight of it is for the Jury to determine. You understand it is being admitted because the Harringtons said they came along and said they saw this car and saw a man there. This testimony is the young man came up there several days later—he went out to see a place about eleven miles out—there is no testimony this is precisely or exactly the place. Whether or not it will be accepted by you as being the place is a matter you will have to carefully weigh in determining the weight you give this particular testimony.

You may proceed.

A. They were generally on the south side of the road—the road running from west to east.

Mr. Mack: Did you observe which side of the road? A. Southwest probably.

Mr. Mack: From west to east?

A. The road from Curlew to Orient runs west to east. [106]

Q. (By Mr. Sugarman) Did you see any marks of digging?

Mr. Mack: I definitely object to that as incompetent, irrelevant and immaterial.

The Court: I sustain the objection.

Mr. Morey: It occurs to me the digging was definitely——

(Deposition of Tom Heatfield.)

The Court: I sustained it in view of the answer given here. The question and answer are stricken.

Q. Now did you observe anything in the vicinity of these tracks?

A. A log had been placed in such a position as to form a track back to the shoulder of the road from the ditch.

The log was backed up by rocks and had been used as a bulkhead—bulwark perhaps is a better word—against which to bank this dirt.

Q. Mr. Heatfield, did you see any tracks which would indicate how the car had gotten back on the road?

A. Yes, I did. The tracks were very definite and they were deeply imbedded in the loosely shoveled earth.

Mr. Morey: May I suspend this for just a moment? I see my doctor witness has come in. [107]

DR. W. N. MYHRE:

A witness called for and on behalf of the Plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Morey:

Q. State your name please.

A. William N. Myhre.

Q. What is your profession?

A. Physician.

(Testimony of Dr. W. N. Myhre.)

Q. Where do you practice?

A. In Spokane—Paulsen Building.

Q. With whom are you associated?

A. Dr. John Byrd.

Q. Where did you get your education—medical education?

A. St. Louis University.

Mr. Mack: We admit the doctor's qualifications.

Q. Dr. Myhre, you have been specializing, have you?

A. Yes, I have.

Q. In what branch of your profession?

A. Internal medicine.

Q. Does that include heart diseases?

A. It does.

Q. How long have you been practicing in this locality?

A. I was licensed in 1933. [108]

Q. You have been practicing here continuously since that time?

A. No I have not.

Q. Did you know Augustus S. Heatfield?

A. I did.

Q. Do you know the last time you saw Mr. Heatfield?

A. Yes I do.

Q. When was it?

A. It was about September, 1939—that date may be wrong—I think that is the correct date.

Q. Did I get the right year?

A. It may have been 1940—I don't recall exactly. It may be either 1939 or 1940.

Q. Where did he call on you at your office?

A. Yes, he did.

Q. What was the purpose of that call?

A. He had been having pains in his arms and shoulders.

(Testimony of Dr. W. N. Myhre.)

Q. Did you examine him? A. I did.

Q. Did you make a general examination at that time? A. No, only a superficial.

Q. Was there any complaint made to you at that time of any heart trouble?

A. None at all.

Q. What diagnosis did you arrive at so far as his arm condition was concerned

A. I felt it was sub deltoid persitis. [109]

Q. What was his nervous condition?

A. Good.

Q. Dr. Myhre did you attend the autopsy on the body of Mr. Heatfield? A. I did.

Q. That was here in Spokane? A. Yes.

Q. Who was the Pathologist?

A. Dr. Snyder.

The Court: When was that, do you recall?

A. I don't remember exactly the date, it was during the summer of last year.

Q. You say Dr. Snyder was there?

A. Yes.

Q. Who else was there?

A. Dr. Cunningham, James C. was there—I believe Dr. Lewis was there, Dr. Dave Lewis.

Q. (By Mr. Morey) Do you remember if Dr. Peter Reid was there? A. I believe he was.

Q. (By the Court) Was anyone else there?

A. Two other men, I don't know who they were.

Q. (By Mr. Morey) I was there, was I not?

A. Yes, Mr. Morey was there.

(Testimony of Dr. W. N. Myhre.)

Q. That post mortem was had in a very careful manner was it not, Doctor?

A. Yes, it was. [110]

Q. And took about how long to make the post?

A. Between one and two hours, I believe. I don't recall exactly.

Mr. Morey: I think I may be permitted to preface my question by making a statement. We were not able to get Dr. Snyder down here. I intended to have him testify before Dr. Myhre, but I couldn't get him this morning.

Q. Was there anything, Dr. Myhre, in that post mortem examination which in any way by itself indicated what had caused Mr. Heatfield to die?

A. Yes, I think there was.

Q. What would you say that was?

A. There was evidence of coronary arterio-sclerosis.

Q. All right. Just explain those two words. Coronary means what?

A. It's the name of the vessel which supplies the heart with blood. There are three of them—two main branches.

Q. What do you mean by arterio-sclerosis?

A. It's a process which thickens, hardens or changes the walls of the blood vessels.

Q. Otherwise called hardening of the arteries.

A. That's right.

Q. Did you find this condition of arterio-sclerosis in Mr. Heatfield in such a pronounced state that of and by itself without anything on the outside

(Testimony of Dr. W. N. Myhre.)

would cause his death? A. I do not believe so.

Q. Would you say that the arterio-sclerosis that you [111] found in Mr. Heatfield was unusual for a man of his years?

A. I do not believe it was.

Q. Do you know how old he was?

A. Somewhere around sixty-five, I believe, I am not certain about that age.

Q. What life expectancy does a man have at that age?

A. I don't know what the life expectancy is.

Q. Did you find so far as this arterio-sclerosis was concerned Mr. Heatfield had about the same life expectancy that any normal man would have of those years?

Mr. Mack: That is objected to as incompetent, irrelevant and immaterial and not within the issues.

The Court: It isn't the ordinary case of life expectancy as we find it. I think I will sustain the objection and let you restate your question in another way.

Q. I think you have answered this, Doctor, but how long do you think Mr. Heatfield in the condition you found him, unless something unusual, out of the ordinary, would have lived?

Mr. Mack: I object to that as incompetent, irrelevant and not based on any facts. It's purely speculative.

The Court: The objectionable part of your question is the 'how long' part.

(Testimony of Dr. W. N. Myhre.)

Mr. Morey: I will pursue the question along another line.

Q. Dr. Myhre, I will ask you this question, assuming the evidence in this case shows a man sixty-five years of [112] age whose work was office duties and traveling, who was not accustomed to hard work, hard manual labor, and did not engage in any hard manual labor, and who, prior to June 30th, 1942, was apparently in good health; who did not know he had any heart trouble of any kind, and who, on that day of June 30th was seen by his wife and a friend in his usual state of health, the friend seeing him about three on that afternoon, and who according to the evidence now in this case was discovered about six o'clock in the afternoon in a car off the road in the dirt, and in a tight spot in the dirt so it could not be moved without being towed, and who was observed by two witnesses at that time to be greatly exhausted, one of those witnesses having observed that some dirt had been shoveled alongside this car, and this party having stated to one of these witnesses that he had been there for two hours and had gotten so tired he had to lie down, and another statement made by him at that time was that for the first time in his life he had any pains about the heart, and assuming there was another witness who saw him about within half an hour after this other witness had seen him, to whom this party said he had overexerted himself, and when the second party saw him the man was definitely sick, retching

(Testimony of Dr. W. N. Myhre.)

and vomiting, trying to vomit, and further assuming that man was in a stooped over position, when this second witness saw him, and that when the first witness up at the car saw him he was holding his hands in front of his abdomen, then supposing he was put to bed at this camp where this second or third witness was talking to him and during the night he passed away,—do you have any opinion, [113] Doctor, as to what caused this man's death?

Mr. Mack: I object to that as incompetent, irrelevant and immaterial, not a statement of the facts in the case, no showing of anything whatsoever as to the facts with reference sufficiently for anyone to base an opinion on, the evidence being very definitely—

The Court: Just state your objection.

Mr. Mack: Incompetent, irrelevant and immaterial, no proper foundation having been laid and as a hypothetical question does not conform to the facts in the case; assumes facts not proven and the facts alone would be insufficient on which to base any hypothetical question.

The Court: To what extent do you contend the question assumes facts not in evidence?

Mr. Mack: The facts I have very definite reference to obviously is the fact he said he was exhausted. There is no testimony establishing that situation. That is a fact that is a conclusion, and the definite fact that he very definitely tried to, and did, vomit, is not in accordance with the facts;

(Testimony of Dr. W. N. Myhre.)

there is no testimony whatsoever that this man had been doing any shoveling whatsoever, either. The witness merely said there was some dirt on the front end of the wheels, the left front wheel, and there is no showing as to the extent of the man's work, and assuming those facts which do not coincide with the evidence.

The Court: So far as the question refers to testimony by Mrs. Heatfield, you have not yet put in her testimony, and ordinarily I wouldn't permit the question [114] to be asked, but knowing the triple duties doctors have these days, I let that go with the understanding you will supply that, if you don't supply that, the whole hypothetical question and answer go out. As to the objection, he didn't say he was exhausted—there is testimony as to the use of that word. The testimony of Mrs. Harrington was he was hot and tired and all in, that will have to be sufficient for the word "exhausted". The testimony of Mr. Callan was he tried to vomit but did not succeed in vomiting. There is evidence—can you amend your question in those particulars?

Mr. Morey: I would like to add——

The Court: (To the witness) Do you understand the changes I have made?

Witness: Yes.

Mr. Morey: I don't know whether I included this statement that this party we have been talking about is the Mr. Heatfield whose body he examined.

(Testimony of Dr. W. N. Myhre.)

Mr. Mack: That wouldn't make any difference.

Mr. Morey: Except it would show the condition of arterio-sclerosis.

The Court: You may add that into the question. I will overrule the objection with the understanding it is later to be connected up with Mrs. Heatfield's testimony. (To the Doctor) The question now is do you have any opinion, you understand that? A. Yes.

Q. Now, please state what your opinion is as to what [115] caused his death.

Mr. Mack: To which we object.

The Court: Objection overruled.

A. You want a technical opinion, with a medical terminology?

Q. I suggest first you use the medical or technical term, and then explain that to us.

A. I believe that Mr. Heatfield died of mio-cardio insufficiency due to coronary stenosis.

Q. Now tell us what you mean by the word miocardio. A. That's the heart muscle.

Q. The heart muscle is called——

A. Mio-cardium.

Q. When you use the word insufficiency you mean just what the layman would mean.

A. Exactly.

Q. Now tell us, if you will, a little more about what you mean by mio-cardial insufficiency.

A. The coronary blood vessel supplies the heart muscle with nourishment or blood without which the heart muscle is insufficient. Stenosis of the

(Testimony of Dr. W. N. Myhre.)

coronary vessel is the narrowing of the lumina in the vessel making the amount of blood passing through it much less than the coronary vessel would carry, consequently the muscle cannot function normally in the absence of this blood.

Q. This sclerosis is also a hardening of the [116] vessel.

A. You might liken it to a thickening or deposit on the inside of a pipe. You might liken it to your gasoline, a thickening or deposit on the inside of your gas line—it will carry you along on the level beautifully, but if you attempt it on a hill where the car requires a large amount of gas the car will do the same thing that Mr. Heatfield's heart did—it will stop.

Q. What is vital to the muscle?

A. Blood.

Q. What is included in the blood?

A. The most important thing is oxygen.

Q. The mio-cardium has to get some oxygen in order to work.

A. That's right.

Q. In other words, a man in his condition when an unusual strain is placed on that heart it calls for more oxygen and doesn't get it, is that right?

Mr. Mack: I object to that as incompetent, irrelevant and immaterial.

The Court: Q. What is the difference between stenosis and occlusion?

A. An occlusion is a complete obstruction of the vessel, cuts off all the blood.

(Testimony of Dr. W. N. Myhre.)

Q. I believe you testified a while ago that Mr. Heatfield's coronary arterio-sclerosis of and by itself was not sufficient to have brought about this fatal condition without some exertion. [117]

A. Between 10% and 15% of all coronary deaths are due to coronary stenosis rather than coronary occlusion.

Q. I want to ask you this question please—when this coronary vessel that Mr. Heatfield had in his heart gets in the condition you found it in at the time of this post mortem, in any man whether it's Tom, Dick, or Harry, does it throw out a red lantern signal of danger to the man and tell him to look out there is danger ahead?

A. Yes, it can.

Q. Does it ordinarily?

A. If he exerts himself.

Q. If a man is leading a sedentary life and not exerting himself, he goes along without any pain—is that right? A. Ordinarily, yes.

Q. In other words, the thing that brings on this stenosis is over exertion.

Mr. Mack: I object to that as calling for a conclusion.

Mr. Morey: He is an expert.

The Court: The objection is overruled.

A. Exertion will not bring on coronary stenosis.

Q. I want you to explain to me—you used the words coronary stenosis. A. Yes, -sir.

Q. How did you use that in connection with this mio-cardial insufficiency?

(Testimony of Dr. W. N. Myhre.)

A. Coronary stenosis is what you might term the [118] normal ageing process in the walls of any vessel—it's the normal ageing process of all body blood vessels—it occurs earlier in some people than in others. Coronary stenosis as I used it in Mr. Heatfield's case was the narrowing of all blood vessels or, in particular, narrowing to such an extent it was practically incapable of furnishing the nourishment to this heart muscle.

The Court: Q. You say stenosis is not brought on by exertion—what about the insufficiency?

A. The insufficiency is brought on by a demand which is greater than the nourishment from the stenotic vessel, or that the vessel will supply. The muscle then becomes insufficient just like a gasoline motor will become insufficient when it is not supplied with enough gasoline to carry it up the hill, insufficient for the task placed upon it.

Mr. Morey: You may cross-examine.

Cross Examination

By Mr. Mack:

Q. Stenosis, as I understand it then, is the thing itself which causes the blood to flow less freely through the artery. A. That is correct.

Q. That is not brought on by exertion.

A. It is not.

Q. That can happen at any place at any time, day or night, in the man who has this sclerosis, or any minute.

A. Stenosis does not happen in a minute. [119]

(Testimony of Dr. W. N. Myhre.)

Q. It can happen—I don't mean it kills in a minute.

A. It couldn't happen—no—it's a process of years, many years.

Q. What is stenosis?

A. It means the narrowing due to sclerosis which is the thickening—the sclerosis causes the stenosis.

Q. If a man has the condition—well, such as Mr. Heatfield had—you say of sclerosis, he has a bad case of stenosis, is that true? Or there is danger of stenosis.

A. All arteries are stenotic in proportion to the degree of sclerosis, no matter which part of the body they are in.

Q. Sclerosis is an accumulation of time, is that fair enough?

A. Yes, it is an accumulation of time.

Q. And in Mr. Heatfield's instance, you say he was approximately sixty-five—it was to be expected what was found there.

A. Yes, it's not out of the ordinary.

Q. And whether the man exercises or not, under that condition stenosis would occur.

A. Stenosis doesn't occur suddenly—it's always there—it's there over the same period of time sclerosis is there.

Q. The stenosis then, apparently, is merely the fact the sclerosis narrows the artery.

A. Stenosis is the same thing that happens in

(Testimony of Dr. W. N. Myhre.)

[120] hot water pipes—there is a lime deposit—it doesn't occur suddenly.

Q. When stenosis becomes complete——

A. Then we have coronary occlusion.

Q. Which is the stoppage of all blood.

A. That's right.

Q. Doctor, what eventually causes complete stenosis?

A. The process will eventually close the vessels, or the fragments of a vessel may break off and obstruct a portion in its continuity.

Q. Is there anything else will bring about closing the vessel?

A. Embolism. foreign matter blocking it.

Q. Anything else? How about bacteria?

A. Bacteria would be foreign matter—or a portion of the vessel wall itself, any stenotic process will gradually occlude it—that's all that can occur.

Q. Is there any way for a man to bring on coronary occlusion from a blood clot by himself?

A. You are limiting that to a blood clot?

Q. Or foreign substance.

A. Foreign substance might be a portion of the vessel wall. I don't know how you limit me in the answer of it. By foreign substance I meant bacteria particularly. You couldn't bring bacteria into the blood stream unless by injectment and they wouldn't get into the coronary vessels. [121] If he wanted to do it himself, he could stick a needle in and inject them.

Q. So coronary occlusion by bacteria, foreign

(Testimony of Dr. W. N. Myhre.)

substance, has nothing in the world to do with it, unless he injects it.

A. An occlusion can occur if a portion of the vessel wall obstructs the vessel.

Q. Well, let me clear the atmosphere if I can. Could the same thing—I think this is a fair question—that you found in Mr. Heatfield have occurred at any time?

A. Mr. Heatfield's coronary vessels were patent—they were open—they were not occluding, they were narrowed. The condition we found in Mr. Heatfield showed no cause of death, except this narrowing of the artery which narrowing would cause death only if the heart needed more blood from that vessel than the vessel could supply. The heart demanded it, apparently his blood vessels couldn't supply it, consequently the blood vessels stopped.

Q. The demand from the heart for more blood is a pretty immediate process.

A. Yes, it is on exertion.

Q. Now, if the exertion brings on this instant demand on the heart for more blood when a man has the condition Mr. Heatfield had, by his exertion he would die pretty rapidly, wouldn't he?

A. It may occur in the matter of many hours after complete obstruction in the vessel, which Mr. Heatfield didn't have. [122]

Q. He did not have any complete obstruction of the vessel? A. He did not.

Q. I understood you to say this was pretty

(Testimony of Dr. W. N. Myhre.)

rapid death—I thought I understood you to say that.

The Court: No, he didn't say that.

A. I didn't say that.

Q. Now exercise would demand more blood.

A. Yes, exercise demands more blood.

Q. The amount of exercise would depend, would it, upon how much more blood the heart might demand?

A. The amount of exercise which he is capable of performing would depend on the amount of blood this coronary vessel would supply the heart.

Q. The amount of exercise he does would depend on the amount of blood the heart would demand—was demanding—I thought I made myself clear.

A. I don't understand you.

Q. Take a man sixty-five years of age in the condition you found Mr. Heatfield in, would it make any difference if he walked a couple of blocks or whether he shoveled a ton of dirt in the amount that the heart would demand?

A. Yes, indeed it would.

Q. So that's what I am saying, the amount of exercise he performed, the heart demands more blood.

A. The heart demands blood in proportion to the amount of exercise the individual undergoes.

Q. And in proportion to the amount of work he [123] does, and if he has done an insignificant amount of work, very likely it wouldn't affect the heart at all.

A. In all probability.

(Testimony of Dr. W. N. Myhre.)

Q. In this thing you are calling—whatever it is I can't pronounce it—what is the pain that goes with it? A. Sometimes there is pain.

Q. Is there ever an exceedingly hard pain?

A. Very often, sir.

Q. And the patient unquestionably knows they are in terrific pain. A. Indeed.

Q. Do I understand you to say that sometimes you have this thing and there isn't any pain?

A. Quite frequently.

Q. And he doesn't know anything about it?

A. Yes, indeed—it is not pain, however.

Q. How does he know about it?

A. He will have a feeling of oppression, shortness of breath, extreme exhaustion, nausea, vomiting, coughing.

Q. Invariably vomiting? A. Not always.

Q. What do you mean by not always?

A. He doesn't invariably vomit.

Q. But that is one of the symptoms?

A. Yes, sir, sometimes.

Q. And exhaustion is another. A. Yes.

Q. Shortness of breath another. [124]

A. Yes.

Q. And would the shortness of breath be quite noticeable? A. Usually.

Q. Isn't it always apparent? A. No, sir.

Q. Any one of those causes can be eliminated and still he may have this stenosis?

A. Yes, sir, any one of the effects.

Q. That's what I meant, the symptoms.

(Testimony of Dr. W. N. Myhre.)

A. Yes, any one of the symptoms may be eliminated, or all.

Q. Then he wouldn't know it at all.

A. Yes.

Q. Then what does he do?

A. Sometimes they die and not know it.

Q. When is that when they die and don't know it—any time of day or night?

A. It may be any time depending on what the occurrence is that caused it.

Q. Supposing you don't know how much work and labor the man had done, could you say whether or not he over-exercised, over-exerted himself—is it possible to tell from that?

A. To tell he had over-exerted from what we found in the dead body?

Q. Yes.

A. I would say it would be very difficult to tell [125] what caused the thing by looking at the autopsy.

Q. Then the answer would be, no, you couldn't tell.

A. That's right.

Q. And you would have to depend, in this particular case, upon the testimony outside of the autopsy to make your conclusion that you have just made for us.

A. Not necessarily.

Q. But in this particular autopsy, did you have to?

A. In this particular autopsy there was evidence the heart muscle would not withstand any exertion, that is, any demand on it, and the autopsy in this particular individual showed in-

(Testimony of Dr. W. N. Myhre.)

complete ruptures of the aorta in its arches which are most frequently associated with exertion in the majority of instances.

Q. And they may cover quite a considerable period of time.

A. Here we have a man who is dead, he has coronary arterio-sclerosis to a degree the arteries are insufficient to supply the heart muscle with much blood and we have, also, in the arch of the aorta incomplete rupture which rupture is most frequently following heavy exertion.

Q. Incomplete hemorrhage?

A. Incomplete rupture of the wall of the aorta, most frequent cause for this is extreme exercise.

Q. What do you mean by incomplete?

A. I mean a break in the continuity of the blood vessel wall which does not extend through the wall—those [126] were present.

Q. Where is this aorta?

A. They were in the portion of the great vessel which leads the blood out of the heart.

Q. It has to get in there before it goes out.

A. That is an entirely different blood system. The blood which supplies the heart is entirely separate from that which leaves the heart.

Q. The aorta is the one that leaves the heart.

A. Yes.

A. And that was found ruptured?

A. Incompletely ruptured.

Q. Which definitely showed then there was plenty of blood in the *art*?

(Testimony of Dr. W. N. Myhre.)

A. It had no relation to it because the heart is always full of blood, the heart chamber. The heart muscle is in a different system separate from the heart chamber. The heart chamber is always full of blood.

Q. If I understood you right, this artery in which this sclerosis was, had diminished by virtue of the sclerosis. A. That's correct.

Q. And that had nothing to do with the aorta as it goes into the heart, is that apart?

A. The coronary vessels have nothing to do with the aorta as it goes into the heart. It's a separate blood system.

Q. Did this coronary sclerosis, did that have [127] anything to do with that man's death?

A. Yes.

Q. And that's the artery leading to the heart?

A. Leading to the heart muscle but not that supplies the heart chambers with blood. The heart chambers get their blood supply from the veins always.

Q. Where was this artery—this coronary artery—I am trying to get some light on this the best I can—it's not outside the heart?

A. It's in the heart muscle.

Q. Where is that muscle?

A. The heart muscle supplies the motive power for the blood stream. It derives its circulation from a system which is outside the blood stream itself, I mean the circulation through the heart—the coronary arteries come from the base of the

(Testimony of Dr. W. N. Myhre.)

aorta just before the aorta begins, just before it leaves the left ventricle.

Q. Supposing a man died of coronary occlusion, wouldn't that be in the vessel or the valve itself?

A. No, the coronary occlusion would be in the little blood vessel that supplies the heart muscle. The aorta supplies the rest of the body.

Q. This trouble was in the aorta?

A. The stenosis was in the coronary artery, incomplete rupture in the wall of the aorta.

Q. And that was due to what?

A. Most incomplete ruptures of the aorta are due to physical exertion or trauma. [128]

Q. Is it always due to physical exertion?

A. Most always.

Q. There are some cases when it is not due—are there some cases where the aorta is not affected by physical exertion?

A. Incomplete rupture of the aorta may occur in heavy sneezing, heavy coughing—but they would have to be in the presence of a damaged aorta an arterio-sclerosed aorta.

G. In your opinion you are assuming that this man did considerable exercising.

A. One would assume so. This man was dead of a stenotic coronary arterio-sclerosis and not an obstruction. If he had incomplete rupture of the arch of the aorta, one would assume there had been physical exercise or trauma of that part of the body.

(Testimony of Dr. W. N. Myhre.)

Q. What is angina pectoris?

A. Angina pectoris itself is not a cause of death. Angina pectoris simply means a strangling of the chest. It is a symptom.

Q. Angina pectoris doesn't cause death. Isn't an angina pectoris the cause of the muscles surrounding the artery cramping or squeezing so that no blood gets into the heart?

A. That is the theory of angina pectoris.

Q. If that theory is correct he died.

A. He died of coronary insufficiency because the heart didn't get enough blood through that blood vessel. [129] It's not listed as cause of death. It's due to narrowing of the blood vessel.

The Court: Q. Does that cause have the same relationship to death as over-exertion does?

A. Angina pectoris is a strangling of the chest. Where we say a patient died of angina pectoris, we find coronary arterio-sclerosis. There is no instance of angina pectoris causing death. Angina pectoris being a symptom cannot cause death, the death is due to arterio-sclerosis with the failure of the coronary vessel.

Q. And that's because it can't get any blood.

A. Only when the vessels are sclerosed or stenotic.

Q. In this instance you tell us this man did have sclerosis. A. That's true.

Q. But it was not angina pectoris, you say.

A. Angina pectoris is a symptom, the strangling in the chest.

(Testimony of Dr. W. N. Myhre.)

Q. Let's assume, Doctor, there has been a cramping of this particular muscle keeping the blood from getting into a man's heart, couldn't that be just as true as the condition in your aorta?

A. Angina pectoris doesn't cause incomplete rupture of the artery, if that is what you mean.

Q. This man could have the strangling of this vessel, this coronary vessel and die, couldn't he? You say because he couldn't get any blood through that thing, that is what you mean? [130]

A. Yes, sir.

Q. And you say he died of coronary—as a matter of fact he didn't get any blood into his heart, that is what you are saying, isn't it?

A. Yes, not getting blood through the heart muscle.

Q. And died of whatever other name you want to call it? A. Mio-cardial insufficiency.

Q. That means simply insufficient lack of blood in the heart.

A. Lack of blood in the heart muscle, not in the heart.

Q. Well, that is in the heart.

A. No, the heart has plenty of blood in it always.

Q. Well, it's just the matter of a name—mio-cardial insufficiency, or angina pectoris, it's simply a matter of a name.

A. No, sir, they are not one and the same thing, if that is what you mean.

Q. If he had a pain, he could have angina pectoris, is that right?

(Testimony of Dr. W. N. Myhre.)

A. If you have a pain, you might have a headache, or a belly ache, or anything.

Q. That's right. An angina pectoris means merely you have a headache or a stomach ache.

A. No, it means I have a strangling in the chest.

Q. Due to what? [131]

A. Due to anything—usually due to lack of oxygen in the heart muscle.

Q. Are you acquainted with Dr. Tice?

A. Yes, I know him.

Q. Personally? A. Yes.

Q. What do you think of his book on angina pectoris?

A. Dr. Tice is not considered a Cardiologist. He is an Internist.

Q. I don't know what that all means. He writes generally, doesn't he? A. Yes, he does.

Q. Standard works?

A. Standard work on medicine.

Q. And diseases of the body? A. Yes.

Q. If Dr. Tice says a man dies of angina pectoris, he might be right?

A. It is not listed as one of the recognized causes of death.

Q. Anyhow, if Dr. Tice says that, I have a right to assume it, haven't I?

A. You have a right to assume it.

Q. You could be wrong, or he could be wrong, is that it? A. That's right.

Q. And angina pectoris, if he says, comes about from exercise, he could be right, could he not? [132]

(Testimony of Dr. W. N. Myhre.)

A. Angina pectoris is produced by exercise, yes.

Q. Then, of course, that means a pain in the chest.

A. Yes.

Q. That's all exercise does, so far as angina pectoris is concerned, he has a pain in his chest.

A. That's right.

Q. He wouldn't be apt to have his hand down on his abdomen, would he?

A. Not in angina pectoris.

Q. Does the aorta have any reference to the abdomen?

A. There is an abdominal aorta.

Q. Is that the one you are talking about?

A. No.

Q. That is much higher.

A. Yes.

Mr. Mack: I believe that is all.

Mr. Morey: That is all.

The Court: May the Doctor be excused?

Mr. Mack: I may want to call him back. I won't do it unless it is absolutely necessary.

The Court: If you have any questions to ask the doctor, ask them now.

Mr. Mack: I really think I have covered the picture. I won't bother him you can depend on that. I don't want to put myself in that position. I think he is safe to go without asking him any more questions.

The Court: If you have any questions [133] ask him now, or not at all because doctors are busy these days. We have about one-third of the doctors we ought to have.

Mr. Mack: That is all, then. The doctor may go.

(Whereupon: The Court recessed for ten minutes, after which time, all parties present, the trial resumed.)

DR. GEORGE A. C. SNYDER,

a witness called for and on behalf of the Plaintiff,
having been duly sworn, testified as follows:

Direct Examination

By Mr. Morey:

Q. Where do you reside, Doctor?

A. Route 5, Spokane.

Q. What is your profession?

A. Physician.

Q. Where did you get your education?

A. At the University of Oregon, Medical School.

Mr. Mack: We admit the doctor's qualifications.

Q. When did you graduate from college?

A. From Medical School, or College?

Q. Medical School. A. In 1934.

Q. Where was your first location, Doctor?

A. Following internship,—

Q. Where did you interne? A. At Seattle.

[134]

Q. When you left the hospital, where did you go?

A. Arizona.

Q. When did you come to Spokane?

A. In 1939.

Q. Are you following a specialty here?

A. I practice pathology.

(Testimony of Dr. George A. C. Snyder.)

Q. Just tell us if you will, what you mean by pathology.

A. The duty of a Pathologist is chiefly the examination of materials in the laboratory—laboratory diagnosis—examination of tissues removed in the surgery and conducting of post mortem examinations.

Q. Since you have been in Spokane, you have conducted many post mortems, have you not?

A. Yes.

Q. Where is your office?

A. At the Deaconness Hospital.

Q. You are connected with the Deaconness Hospital? A. Yes.

Q. Pathologist for the Deaconness Hospital.

A. That's right.

Q. Doctor, did you conduct an autopsy on the body of Augustus S. Heatfield? A. Yes, I did.

Q. When was that?

A. July 10th, 1942, I believe.

Q. Do you know who was present?

A. Yes, Drs. Joseph B. Finney, David H. Lewis, [135] James H. Cunningham, W. N. Myhre, and Mr. Zappone, I believe.

Q. Was I there? A. Yes, sir.

Q. Doctor, I will ask you what condition did you find this body in?

A. Well, he had been dead for some time and the changes due to—that occur after death, of course.

(Testimony of Dr. George A. C. Snyder.)

Q. I know, but what was there to show if anything, what was wrong with Mr. Heatfield?

A. Well, he had hardening of the arteries which is comparable with a man at his age.

Q. But not of and by itself dangerous.

A. No.

Q. Unless there is something outside that stirs it up.

A. That's right.

Q. The lungs, liver, stomach, brain, everything else you found in this man was good?

A. Yes. There were some small changes in the brain. They were not due to hardening of the arteries—that didn't amount to anything. There was an excessive amount of fluid in the lungs which is comparable with heart failure.

Q. These changes in the brain, that was arteriosclerosis?

A. Yes change to due to a hardening of the arteries, very minor, don't amount to anything.

[136]

Q. I will ask you the same question I asked Dr. Myhre or a similar question: When a man has the hardening of the arteries that you observed in Mr. Heatfield, does that condition, hardening of the arteries, set up a red lantern signal and say to this man "look out, danger ahead", or is a man liable to have that condition and go along without knowing anything is wrong?

A. That would depend entirely on what arteries are involved and how deeply involved it is. Many people have this condition and no symptoms at all.

(Testimony of Dr. George A. C. Snyder.)

Q. In that condition that you found Mr. Heatfield in, do you think there was anything in that condition, of and by itself would be a warning to him he had heart trouble? A. Probably not.

Q. Doctor, considering the fact that Mr. Heatfield was sixty-five years of age, that he was an office man, traveling salesman, and that he had this condition you have just described you found in his body, and that he was not accustomed to hard manual labor, and that he did not know he had any heart trouble, and that man, on a date, June 30th, 1942, in the morning and afternoon was the same as he always had been, apparently in good physical condition to all intents and purposes, seemed to feel all right, about 3 o'clock that afternoon he seemed to be in that condition, about 6 o'clock he was found with his car off the road, a mountainous country road, isolated spot, car in such condition it can't be moved without being towed, [137] this Mr. Heatfield was tired and said that he had been working on his car for about two hours, and worked so hard he had to lie down and rest, and had for the first time in his life heart pains about his heart; then, further assuming that that was about 6:15 and about 6:30 other witnesses saw him and he was vomiting, stooped over, and when this first witness saw him he was holding his hand down on the front part of his body, and the second witness with a third witness, helped put him on a bed that night and while he was there he told this witness he had been working hard on his car, overstrained himself,

(Testimony of Dr. George A. C. Snyder.)

over-exerted himself, and he was found dead the next morning—do you have an opinion as to what caused his death, answer that “yes” or “no”.

Mr. Mack: I object to that as incompetent, irrelevant and immaterial, assuming facts not proven, not showing that the man was vomiting, no showing he had been working two hours——

Mr. Morey: He said he had been working two hours.

Mr. Mack: No statement he had over-exerted himself, it's not in accordance with the facts so far proven in this case.

The Court: The question makes this assumption, that he had not been accustomed to exerting himself, or heavy exertion, your testimony on that is the testimony of his son to the effect that in his work—if you intend to supply that later, I will permit the question to stand. [138]

Mr. Morey: I intend to supply that later.

The Court: Then I will overrule the objection.

Q. Do you have any opinion as to what caused his death? A. Yes.

Q. Now what, in your opinion, caused his death?

A. In my opinion it was due to physiological disturbances of his heart, functional disturbances in the action of his heart.

Q. What caused that?

A. In the first place, this man had a narrowing of the coronary artery due to a hardening process. In a second place, there was a hemorrhage or bleeding about the upper end of the aorta and

(Testimony of Dr. George A. C. Snyder.)

these things, this coronary artery narrowing and the hemorrhages around the upper end of the aorta probably resulted in a spasm of the coronary arteries. In other words, amounting to closing them up so far as supplying the heart muscle and because of that the heart ceased to function normally and the man died.

Q. What started the spasm?

A. It's entirely probable the hemorrhage around the upper end of the aorta did that.

Q. What caused that, did it just happen to him?

A. No, I think not, because there was a break in the intima of the aorta and these breaks are usually due to some sudden strain coming on the vessel. [139]

Q. That's what I want to find out, whether you think the strain had anything to do with it.

A. Yes, I think it did.

Mr. Morey: That is all.

Cross Examination

By Mr. Mack:

Q. Do you recall whether Dr. Boyd was present at the examination?

A. I don't recall offhand, my impression is he was, yes.

Q. Do you think that Dr. Myhre was at that examination? A. Yes.

Q. You made a report, did you not?

A. Yes.

Q. Have you got it with you?

(Testimony of Dr. George A. C. Snyder.)

A. I have a copy of it.

Q. In that report, you stated, did you not, who was present?

A. In my report, Dr. Myhre's name was omitted.

Q. You made that yourself, didn't you?

A. That's right.

Q. How did it come you omitted Dr. Myhre, can you tell us?

A. No, I can't tell you that.

Q. Did you talk to him at that time?

A. I did.

Q. Did he assist you at that time? [140]

A. He was present.

Q. Well he didn't assist you?

A. No, not directly.

Q. Then, as I gather, you say it was just an oversight that his name doesn't appear.

A. Yes, sir.

Q. Was anybody present with you, doctor, at the time you made that report, was any doctor with you at the time you made that report—when you typed the report was anyone there besides yourself—is what I mean—when you made that instrument you have in your hand?

A. Yes, Dr. Finney was there.

Q. In the examination in the autopsy, you observed that the man had hardening of the arteries in the ordinary vernacular.

A. Yes, sir.

Q. How severe was that situation as you observed it?

A. Well, I would say it was moderately severe,

(Testimony of Dr. George A. C. Snyder.)

but there was some narrowing of the coronary artery, especially of the left coronary artery, and a narrowing of the vessel of the brain.

Q. What was there to show so far as the autopsy was concerned, to show that this man did not die of angina pectoris?

A. Well, engina pectoris is a train of symptoms really. It isn't anything you can put your finger on and put out in your hand. [141]

Q. No—because angina pectoris is where the vessel is prevented from entering the heart by the cramping of some muscle, is that right?

A. It's usually due to a spasm of the artery that supplies the heart muscle.

Q. Can a person die of a spasm of the artery?

A. It could be severe enough to cause death.

Q. Does it ever do it?

A. Occasionally it does.

Q. Then, what do we say he passed away of—he died of—if that spasm is the cause of his death?

A. Usually he dies as a result of some very profound disturbance of the cardiac rhythm; oftentimes the heart goes under a quivering contracting, or titulation as we call it, that depends on the shutting off of the blood supply to the heart, you see.

Q. Now taking it on what you found in your autopsy, what other things could have caused Mr. Heatfield's death besides what you have just related?

A. We could find nothing.

Q. It could not have been caused from any

(Testimony of Dr. George A. C. Snyder.)

other condition excepting the strain, is that what you say? A. Restate the question, please.

Q. It could not have been caused, from what you saw by the autopsy, from any other condition than the strain? A. I think not.

Q. It could not have been caused by what I have been calling angina pectoris? [142]

A. I think not.

Q. It might have been?

A. Oh, it's conceivably possible it could be, but the evidence of hemorrhage and so on, here points very definitely to the condition such as I described.

Q. What causes hemorrhage of the aorta?

A. Well, the hardening in the artery results in degenerative changes in the vessel walls, and that, plus the strain or injury, causes the rupture.

Q. Was there anything else that could cause a hemorrhage of the aorta than a strain or injury?

A. Yes, there have been things.

Q. What are they, please?

A. But there is no evidence any of these things existed here.

Q. What are they that could have caused a hemorrhage of the aorta?

A. Certain diseases of the blood—we see them sometimes in very severe infections, things of that sort.

Q. The distinction between the hemorrhage you found in Mr. Heatfield and the one you found in these other conditions, is there any difference?

A. Yes, in that these other conditions generally

(Testimony of Dr. George A. C. Snyder.)

the hemorrhage multiplies and scatters along the vessel, the ones caused by strain usually localizes in one area.

Q. If a man had a cramping of the muscle sufficient to occlude or keep the blood out of the heart, would that not cause a hemorrhage? [143]

A. No, ordinarily it does not.

Q. It takes a physical strain to cause hemorrhage of the aorta. A. Yes.

Q. A very severe strain?

A. Involving the hardening of the artery it takes a considerable strain. If involved in disease, it takes a lesser strain.

Q. Did you find this one involving any disease, this particular aorta of Mr. Heatfield?

A. No disease other than hardening of the arteries, arterio-sclerosis.

Q. You don't call that a disease of the aorta—that doesn't have anything to do with the aorta?

A. Oh, yes, it does.

Q. In what respect?

A. The aorta is the biggest vessel in the body and that is involved in this hardening like the smaller vessels around it.

Q. This sclerosis merely keeps the blood from going to it?

A. Not necessarily unless the sclerosis is of such type it narrows the vessel wall, that's usually caused in the smaller arteries——

Q. Wouldn't it take a great deal of strain to effect a hemorrhage?

(Testimony of Dr. George A. C. Snyder.)

A. Not in an aorta that is weakened by disease.

Q. Was this weakened by disease and what kind of [144] disease?

A. Arterio-sclerosis, hardening of the arteries.

Q. Was there any hardening in the aorta?

A. Yes, the aorta was involved, yes.

Q. Was there sclerosis in there? A. Yes.

Q. To what extent?

A. I would say moderately severe.

Q. Is that what is called the right or left ventricle?

A. No, the ventricle is a part of the heart.

Q. Will you take that autopsy report in your hand and tell us where you say anything about sclerosis in the aorta?

A. Well, this report is made out in medical, technical terms, and here I have, it says "athero-sclerosis of aorta" which is a medical term to use the type of hardening of the artery.

Q. Didn't you think the autopsy showed a rather healthy man?

A. Considering his age, yes.

Q. As a matter of fact, you took the coronary—the heart itself——

A. No, the coronary arteries are the arteries that supply the heart muscle with blood.

Q. Very well, then—you took the coronary artery during the autopsy and very minutely disserted it to determine what condition it was in. [145]

A. That's right.

Q. What were you looking for?

(Testimony of Dr. George A. C. Snyder.)

A. I was looking for clots or any pus in there.

Q. So as to determine if the man had coronary occlusion, wasn't that it, whether he died of that?

A. That's right.

Q. Did you see anything like that?

A. We didn't find any organic occlusion.

Q. Had it been from some outside substance the outside substance would still have showed at the time of the autopsy—the thing that caused the occlusion.

A. You mean if there was a clot in the artery?

Q. Yes. A. Yes, that would be there.

Q. And there was nothing like that?

A. Nothing except clots formed after death.

Q. The only fact then, doctor, as I gathered from your statement, is that because you found a hemorrhage in the aorta, you concluded this man must have been affected by—he must have strained it or over-exerted it, or overworked it, is that correct?

A. That's the assumption, yes.

Q. If you had not found this hemorrhage of the aorta, you wouldn't make the conclusion you do now, is that correct? A. That is correct.

Q. So the fact the aorta did have a hemorrhage it must have had it from a strain or one of the other instances [146] you tell us about? A. Yes.

Mr. Mack: I believe, Doctor, that is all.

Mr. Morey: I am offering in evidence Plaintiff's exhibit F, being the autopsy report.

Mr. Mack: No objection.

The Court: It will be received in evidence.

(Witness excused.)

(Whereupon: Court adjourned to 1:45 P. M., at which time, all parties, present, the trial resumed.)

EDNA L. HEATFIELD,

a witness called for and on behalf of the Plaintiff,
having been duly sworn, testified as follows:

Direct Examination

By Mr. Morey:

Q. Your name is Edna L. Heatfield?

A. Yes, sir.

Q. You are the Plaintiff in this lawsuit and the widow of Augustus S. Heatfield. A. I am.

Q. How long were you and Mr. Heatfield married? A. A little more than forty years.

Q. Did you live in Spokane a good part of that time?

A. Yes, our residence was there all of that time.

Q. What was Mr. Heatfield's business? [147]

A. He was special agent, or State agent, for Selbach & Deans, General Agents in San Francisco.

Q. And they, in turn, were agents for what company?

A. Hanover Fire Insurance Company.

Q. How long had he held that position?

A. About twenty-six years, maybe a little longer.

Q. What was the nature of his work as such agent?

A. He appointed agents, his title I believe, was State agent—he did the office work in connection

(Testimony of Edna L. Heatfield.)

with the business in Spokane and traveled as much as was necessary to carry on the duties.

Q. He traveled in his car, sometimes by train or bus? A. Yes.

Q. Did his work necessitate hard, manual labor?

A. No, sir.

Q. What was Mr. Heatfield's build?

A. Well, he was about five feet eight inches tall, weighed about, I should say, 150 pounds.

Q. Was he what you would call a husky build?

A. Well, rather muscular.

Q. Did he ever engage in any hard, manual labor? A. Not that I know of.

Q. You knew him pretty well, didn't you?

A. I think I did.

Q. Have you ever, in the last few years, ever seen Mr. Heatfield engage in such hard labor so as a result [148] he was worn out and his shirt ringing wet?

A. I saw his shirt ringing wet, but it was after he was dead.

Q. I mean any other time except that?

A. No, sir.

Q. What were the outward appearances of his physical well-being?

A. Well, he looked unusually young for a man his age.

Q. He appeared to be healthy?

A. Yes, sir.

Q. As far as you know did he have any heart trouble? A. No, sir.

(Testimony of Edna L. Heatfield.)

Q. Do you know the last time he called on any doctor?

A. I would say the last time I knew was the latter part of 1941.

Q. Whom did he call on then?

A. Dr. Myhre.

Q. You are pretty sure that was in 1941?

A. Yes, I am quite sure of it.

Q. What was his nervous temperament?

A. Well, he was very high strung and excitable.

Q. Did you see him on the morning of June 30th, 1942?

A. Yes, sir.

Q. Where was he going? [149]

A. He was going to Republic and Colville.

Q. What was the condition of his health that morning when he left home?

A. He was very chipper, just as usual.

Q. When were you advised of his death?

A. At eleven o'clock on July 1st.

Q. The day after he left?

A. Yes, sir.

Q. Did you subsequently receive some of his personal effects from the undertaker at Colville?

A. Yes, through Smith & Company.

Q. Some clothing?

A. Yes.

Q. Tell the Jury about that shirt you were talking about awhile ago, what was the condition of that shirt, do you know it was his shirt?

A. Yes, I do, it was a white Arrow shirt. The shirt was stained and yellow clear to the shoulder. The collar was wilted and stained clear through with what I took to be perspiration.

(Testimony of Edna L. Heatfield.)

Q. When did you find the Standard Accident policy?

Mr. Mack: I object to that as incompetent, immaterial and irrelevant under the issues in this case.

The Court: I overrule it for the same reason I gave yesterday in ruling on the deposition of the representative who came up here from San Francisco, Mr. Selbach. [150]

A. Mr. Selbach found the policy in my husband's office. It was in August, I don't remember the date.

Q. He advised you of his find? A. Yes.

Q. Had you, prior to that time, made a search for this policy? A. I had not.

Q. Anybody for you?

A. Yes, my son looked through his effects at the office.

Q. Did you find any other policies or anything?

A. We found a policy in his boxes in the vault of the Paulsen Building.

Q. Life insurance policies?

A. Life insurance policies made out to my son.

Q. By the way, do you know what the current premium was on that Standard Accident policy at the time of his death, or just before his death?

Mr. Mack: I object to that as immaterial.

The Court: Objection sustained.

Q. Mrs. Heatfield, did you ever receive "proof of loss" forms from the Standard Accident Insurance Company?

(Testimony of Edna L. Heatfield.)

Mr. Mack: I object to that as incompetent, irrelevant and immaterial under the issues in this case.

The Court: That is specifically admitted by the answer. [151]

Mr. Mack: Yes, that's right.

The Court: In the answer it is specifically admitted these forms were not sent.

Mr. Morey: My question was when, if any, she received forms from the Standard Accident. In other words, the policy provides after they receive notice of loss they should furnish her with forms and if those forms are not furnished within fifteen days then she may furnish her own forms, then this question is intended to be directed to the witness when, if ever, she got those forms from the Standard Accident Company—I think it's justified in showing she submitted her own forms.

The Court: Look in the fourth paragraph of the answer—"More than fifteen days elapsed".

Mr. Morey: That's right—I had forgotten that.

The Court: I will sustain the objection.

Mr. Morey: You may examine.

Cross Examination

By Mr. Mack:

Q. When did you receive the clothes from Smith and Company, you were talking about here?

A. I don't remember the date. A day or two after Mr. Heatfield's body was brought down.

Q. Did I understand you to say that at that time they were wet with sweat?

(Testimony of Edna L. Heatfield.)

A. I didn't say wet, I said stained. [152]

Q. I beg your pardon. And there were other conditions about them in addition to the perspiration that you observed—I thought you said something in addition to that—I really didn't hear it.

A. I said his shirt was stained as if with perspiration around the collar and the neck and down to the shoulders.

Q. What kind of a day was that day in June, 1942?

A. I have heard them say it was a hot day. I couldn't swear to that.

Q. I think you said, Mrs. Heatfield, that you found other policies, or the boy found other policies?

A. Yes.

Q. Did you find any policy yourself?

A. The policies were brought to the house.

Q. Did you find any, yourself, regardless of what the boy brought to you?

A. You mean in addition to what he brought—he didn't bring the policies I mentioned.

Q. Those he found, what did he do with them—let's put it that way.

A. He didn't find any policies—I don't think I said my son found any policies.

Q. You said your son made a search for policies, is that correct?

A. Made a search in the desk, yes.

Q. Mr. Morey: She said her son searched for policies—she didn't say who found the policies in the Paulsen Building, she didn't say it was her son. [153]

(Testimony of Edna L. Heatfield.)

Q. Do you know whether your son found any in his search?

A. I don't know that he did.

Q. Did he ever tell you he found any?

A. I don't know that he did or not.

Q. You don't remember?

A. No, I don't remember.

Q. How do you know that those were payable to him—you say they were all payable to him.

A. Because I signed releases on them.

Q. Were there any accident policies besides this one in question?

A. I believe there were, yes.

Q. I understood you to say there were all life policies?

A. I said we found some life insurance policies.

Q. You say he found them?

A. I didn't say 'he'.

Q. You used the word 'we' instead of 'he'?

A. The policies were brought to me at the house.

Q. Who brought them?

A. Mr. Morey, I believe, I asked him to.

Q. Then there was some in there, is that correct, in addition to what Mr. Selbach evidently gave you.

A. Yes.

Q. And there were some of them accident policies.

A. I am not sure if there were any accident policies in the box. [154]

Q. Where did you get the policies you said a moment ago were accident policies?

(Testimony of Edna L. Heatfield.)

A. I said I believed there were other accident policies, I don't know whether they were in the box, I don't remember seeing them in the box.

Q. Did you finally get them?

A. Yes, we finally got one, I know of.

Q. What company was that?

A. The Hartford, I believe.

Q. Was that the Aetna Company?

A. I don't think it is the Aetna.

Q. You had one in the Aetna—was that a life?

A. I didn't have one in the Aetna, my son had one.

Q. And the Illinois-Central Life Insurance Company?

A. I believe that isn't a life insurance company. I don't remember exactly what they were.

Q. You do know some of them were accident policies? A. In the box?

Q. I don't care where they were, please, whether or in the box or not.

Question Read: 'You do know some of them were accident policies'?

A. In the box?

The Court: He said he didn't care whether they were in the box or where they were. [155]

A. Yes, I believe there were two accident policies, but I don't know whether they were in the box or not.

Q. You say Mr. Heatfield was high strung and of rather excitable nature? A. Yes.

(Testimony of Edna L. Heatfield.)

Q. Very noticeable, was it?

A. Well, at times, if anything unusual went wrong.

Q. Do you know what he went to Dr. Myhre for?

A. I believe it was neuritis in his arms.

Q. Did you go with him? A. No.

Q. You said he was what you called a rather muscularly built man. A. Yes.

Q. Weighed 150 pounds? A. Yes.

Q. He never complained to you of heart trouble? A. No.

Q. He never had any, did he?

A. None that I ever heard of.

Mr. Mack: I believe that is all.

(Witness excused.)

Mr. Morey: I will now proceed with the

DEPOSITION OF TOM HEATFIELD,

if your Honor please.

‘Q. Where were those tracks with relation to the other tracks that you have described?

‘A. There were two sets of tracks in evidence; one set was leading off the shoulder of the road, the second set [156] overlapping these was leading back to the road.

‘Q. I have before me five photographs—do you know who took these pictures?

‘A. Yes, sir, I did.

‘Q. When did you take them?

(Deposition of Tom Heatfield.)

‘A. I took two of them on the evening of July 3rd, and the remainder on the day of July 4th.

‘Q. I refer to the first of these pictures (Notary marks picture exhibit A) and ask if this photograph shows any of the marks that you saw at the time of your visit to the scene.

‘A. This photograph shows very clearly the marks made in the loose earth where the car was taken back to the shoulder of the road.

Mr. Morey: This photograph marked exhibit A in the deposition, will be plaintiff’s identification G in this case. I offer in evidence G, the photograph bearing the Notary’s mark exhibit A.

Mr. Mack: I object to it as incompetent, irrelevant and immaterial, not properly identified, no showing where it was taken with reference to any condition apparent in this case.

The Court: The photograph is admitted in evidence. That portion of the answer of the witness which reads ‘the car was taken back to the shoulder of the road’ will be stricken and the Jury instructed to disregard it. The picture will show for itself and the Jury is entitled to determine that question itself. [157]

‘Q. The second photograph to be marked exhibit B. This photograph illustrates the type of highway at that point?

‘A. Yes.

Mr. Morey: I offer in evidence this photograph marked by the Notary ‘B’, and which has been marked in this case as plaintiff’s exhibit H.

(Deposition of Tom Heatfield.)

Mr. Mack: I made the same objection as to exhibit G.

The Court: Objection overruled. It may be admitted.

‘Q. I show you a picture which I am asking the Notary to mark exhibit C. Mr. Heatfield, what does this photograph indicate?

‘A. This photograph also shows the loose earth which was shoveled from the shoulder of the road and the tracks which the car made when returning to the road and it shows the log against which the loose earth was banked to form a track.

Mr. Mack: I move to strike the answer as incompetent, irrelevant and immaterial and an opinion of this witness, and no evidence showing he had any knowledge of where the car was.

The Court: Motion granted and Jury instructed to disregard it. The photograph will speak for itself. The witness is not entitled to say that anything was ‘shoveled’.

Mr. Morey: Now, your Honor, I am [158] offering the exhibit marked C in the deposition and marked plaintiff’s exhibit I in this case.

The Court: It will be admitted subject to the same objection and the same ruling.

Mr. Morey: May I have the exhibit marked D in the deposition marked plaintiff’s exhibit J?

‘Q. Now I show you the fourth photograph which I will ask the Notary to mark exhibit D. Mr. Heatfield, I show you this exhibit D, and ask you

(Deposition of Tom Heatfield.)

if it shows any of the marks that you state you saw?

'A. Yes. This photograph shows also the loose earth and wheel marks.

Mr. Morey: I offer in evidence this exhibit J.

Mr. Mack: To which we make the same objection as to H, I and G.

The Court: The same ruling—it may be admitted but the answer is stricken except the word 'yes'. you are entitled to read the word 'yes'.

Mr. Morey: Now, your Honor, so far as I am concerned, I will not offer any part of page eight, other than we have done. However, for the sake of the record, I am now reading from page 9, commencing with the third line 'Q. Are there any signs of digging in this photograph?'

Mr. Mack: To which I object as incompetent, irrelevant and immaterial.

The Court: The objection sustained.

'Q. Mr. Heatfield, do you know whether your Father [159] carried a shovel in his car?

Mr. Mack: I object to that, if your Honor please, because he definitely stated he hadn't seen his Father since January, 1942.

The Court: That goes to the weight rather than the admissibility. The objection is overruled.

'A. I know that he very consistently carried a short handled Army type shovel in his car for emergencies.

'Q. Could you tell how far the dirt which you stated had been dug, had been moved?

(Deposition of Tom Heatfield.)

Mr. Mack: I object to that—

The Court: The objection sustained. You may make your offer—reading from line 10 on page 9—the remainder of the direct examination I will sustain an objection to all of that. I will let you read his last answer on page 10 line 7.

‘Witness: I would like to add that this was very mountainous country and there were few places where a car could leave the road without going down the side of the mountain.’

Mr. Morey: That is the end of the direct examination. I am now offering in evidence, which I forgot to do this morning, plaintiff’s exhibit K which is, ‘E’, in the deposition.

Mr. Mack: I make the same objection.

The Court: The same ruling. It will be admitted. [160]

Cross Examination

By Mr. Mack:

‘How far did you examine this road very carefully to determine the number of places a car could go off?’

‘A. I drove it all the way from Orient to Currelew.

‘Q. How many miles is that?’

‘A. I don’t recall exactly—I think about 22 or 24 miles.

‘Q. But you stated a minute ago you knew where the accident occurred where the accident transpired.

‘A. After I had contacted Don Abrahams, I

(Deposition of Tom Heatfield.)

knew approximately where the accident occurred, yes.

‘Q. Was the contact with Mr. Abrahams before or after you had gone over the 22 to 24 miles?

‘A. It was approximately midway. He was stationed at the summit of the mountain between Curlew and Orient. Prior to talking to Mr. Abrahams I did not know where to look for the scene.

‘Q. Did Mr. Abrahams write anything out for you?

‘A. No.

‘Q. Just what you got from him, he told you?

‘A. Yes.

‘Q. At that time had you located the place in your mind—at the time he told you had you located the place?

‘A. I had never seen the road before. I knew approximately where to look from what he said.

[161]

‘Q. You said you met him about halfway at the particular time you first contacted him.

‘A. Yes.

‘Q. Had you located the place?

‘A. No.

‘Q. Which way were you going?

‘A. I was going west toward Curlew.

‘Q. Then it must have been between the point that you thought your Father had this difficulty and Curlew—where you think it occurred.

‘A. It occurred between this forester’s station and Curlew, that’s correct.

(Deposition of Tom Heatfield.)

'Q. Who else was with you at the time?

'A. Fred Rosslow.

'Q. Where is Fred now?

'A. I believe he is still at Fort Benning, Georgia, at officers' training.

'Q. Is he at Fort Benning, Georgia?

'A. Yes, officers' training.

'Q. Was he at the officers' training camp at that time?

'A. No.

'Q. Hadn't been sent there yet?

'A. No.

'Q. Is that the gentlemen who is one of these exhibits?

'A. Yes, sir. [162]

'Q. Well, you took two pictures one day and three pictures the next.

'A. Yes.

'Q. He with you both times?

'A. Yes.

'Q. Where did you stay that night?

'A. At Republic, Washington.

'Q. At what particular place?

'A. At the hotel—I believe the only one in town—I am not sure. I don't know the name.

'Q. Did you register?

'A. Yes.

'Q. What time of the day did you go back the second time?

'A. Left Republic about 10 o'clock A. M. on the Fourth of July.

(Deposition of Tom Heatfield.)

‘Q. I am calling your attention to exhibit A—what particular marks do you refer to in exhibit A?

‘A. Exhibit A shows the loosely shoveled dirt and shows the wheel mark very distinctly leading back to the shoulder of the road from the ditch.

‘Q. Meaning which particular marks?

‘A. These marks here—leading from the ditch up to the shoulder of the road—that’s a double wheel mark.

‘Q. Where’s the other wheel mark?

‘A. Apparently the back wheel followed the front one through this loose earth.

‘Q. Then that’s the right wheel mark. [163]

‘A. Yes.

‘Q. There’s nothing on there that shows the left wheel mark.

‘A. I believe the left wheel was at all times far enough up on the shoulder of the road.

‘Q. You say you believe that—you went there—

‘A. I didn’t see it there in the ditch.

‘Q. You didn’t see the car there at all did you?

‘Mr. Sugarman: Mr. Mack, you asked him his opinion.

Mr. Mack: I am just asking where the wheel was. What is that, if you know, this mark right across the road (indicating)?

‘A. That’s the shadow of a tree.

‘Q. Whose picture is that—who is the gentleman in the picture?

‘A. That’s Fred Rosslow.

‘Q. I am calling your attention to exhibit B.

(Deposition of Tom Heatfield.)

It was introduced to show the condition of the road?

'A. Yes.

'Q. With reference to 'A' at what point in the highway was 'B' taken?

'A. May I refer to the object in the picture? This log in exhibit B which appears opposite the front end of the black coupe, is the same one which is in the immediate background in exhibit K.

'Q. What do you mean? I don't get the 'immediate background'. [164]

Mr. Sugarman: Indicating the log behind the figure of Mr. Fred Rosslow, in exhibit B, it would be to his left.

'A. Yes—his left. In other words the pictures were taken at the same spot on the road.

'Q. There is—calling your attention to B, there isn't any indentation off the road on B, is there—that appears on it?

'A. I think it doesn't appear, at least not clearly in the picture.

'Q. Where does it appear at all in B; you might point out to me if you think it appears at all in B.

'A. I think it doesn't appear, at least not clearly. Picture B is taken from too low a viewpoint to show the tire marks which appeared in exhibit A.

'Q. The tire mark that appears on exhibit A is unquestionably to the right of the log, to the left of Mr. Rosslow, in exhibit A, is it not?

'A. Yes.

(Deposition of Tom Heatfield.)

Mr. Sugarman: That would depend on which way you were facing.

Mr. Mack: It's to the right—Mr. Rosslow is facing toward the road, is he not?

'A. Yes.

'Q. May I again call your attention to exhibit B, please, and to the log which is directly at the end of what you said was the main log in exhibit A, to a log which runs directly opposite of the main log, running on to the [165] road in exhibit B—where is that log in exhibit A?

'A. It is in front of the foreground of the picture, therefore not appearing in the picture.

'Q. The stones in the back of the prominent log in exhibit A are the same stones in exhibit B?

'A. Yes.

'Where is the log prominent behind the stones in A?

'A. If I understand your question correctly, you are becoming confused due to the fact that in picture B the angle of the picture does not indicate the distance which actually lies between the log at right angles to the road and the log in question which is more nearly parallel to the road.

'Q. This main log in A is parallel and is in back of the stones, isn't it?

'A. Yes.

'Q. If you observe closely the log on which this log in A lies, it also lies on the same log in B, doesn't it? I will make it clearer, taking A this main log lies on, at least across three other logs.

(Deposition of Tom Heatfield.)

Mr. Sugarman: You are now referring to the log which is next to the highway?

Mr. Mack: Yes.

'A. Are you still trying to find out why this log in B does not appear in exhibit A?

Mr. Mack: It is not your province to question me. What I want to know is definitely why the log [166] that lies at the end of the prominent log in A which appears definitely to be there in B, is not in B.

'A. As I answered previously, the angle at which the picture exhibit B was taken does not show the distance which actually lies between the two logs in question. They appear to be almost in contact while actually they are a considerable distance apart.

'Let me call your attention, then, to this second log in A, which is below, or to the left of the first log. Do you see it, Mr. Heatfield?

'A. Yes. That log also is below the line of sight in picture B.

'Q. Then, as I gather it, there were some logs up in the air when you took this picture B.

'A. Some logs were on higher ground than other logs.

'Q. The ground before picture B was taken had not been changed any by you or Mr. Rosslow.

'A. No. Nothing was ever changed by either of us.

'Q. Calling your attention to exhibit C, which log is that in A, if any?

(Deposition of Tom Heatfield.)

‘A. That log, the most prominent one in exhibit C is also the most prominent one in exhibit A.

Mr. Sugarman: By the most prominent log, we mean the log that runs more or less parallel to the highway and appears to be behind the figure in exhibit A, is that correct?

Mr. Mack: That’s right. [167]

‘Q. Exhibit C also fails to show any such log as appears in exhibit B, directly running opposite to exhibit A and at the very bottom of it.

Mr. Sugarman: You are referring now to the log which appears in exhibit B that runs almost at right angles with the picture’s margin at the left of the picture.

Mr. Mack: That’s right.

‘A. On the contrary, the tip of this log can be seen at a point nearly opposite Mr. Rosslow.

Mr. Sugarman: Mr. Rosslow being the figure in exhibit C.

Mr. Mack: That’s right.

‘Q. Mr. Rosslow, in exhibit C, is very much in front of that log that we have been talking about, in front of it.

Mr. Morey: I object to the question as ambiguous, I don’t believe we have identified the log in exhibit A as any log that appears in exhibit C.

The Court: Objection overruled.

‘A. Exhibit C illustrates my statement that there was considerable distance between the two logs in question.

Mr. Mack: All objections having been reserved,

(Deposition of Tom Heatfield.)

I am still asking for an answer to my previous question.

‘A. I don’t understand the question—what he means ‘in front of’.

‘Q. You see the only prominent log in exhibit C, [168] do you not, Mr. Heatfield?

‘A. Yes.

‘Q. There is only one prominent log in exhibit C, isn’t that a fact, and that Mr. Rosslow, who was with you is in front of that log, not in back of that log?

Mr. Sugarman: I object. You can’t indicate what the front or the back of a log is. *You* I object on the ground that it is ambiguous.

Mr. Morey: I will waive the objection at this time.

Q. You concede, do you not, Mr. Rosslow was at one end of the log—this prominent log in A?

A. He is not at the end of the log—he is some distance toward the camera from the end of the log.

‘Q. At least he is not in front of that particular log in exhibit A.

‘A. I still don’t understand what you mean by ‘in front of’.

Mr. Sugarman: Mr. Mack, would it help any if the witness were asked as to the front or the rear of the picture? Perhaps that might help.

‘Q. Is not Mr. Rosslow at one end of that log?

‘A. No.

Q. That is, not the end of the log where he is

(Deposition of Tom Heatfield.)

standing—the log extends on and on beyond the place where he is standing in that picture?

‘A. No. He is standing between the camera and the end of the log, let me say the near end of the log. [169]

‘Q. What you call the near end of the log. Examine now, exhibit C, and isn’t he standing exactly at the other end of the log than he was standing at when exhibit A was taken, exactly.

‘A. You mean the opposite end of the log? No he is not.

‘Q. All right. We will just leave it there. I am handing you, please, exhibit marked D. There appears to be three rocks in D—are they the same identical rocks at the end of a log in A?

‘A. Yes.

‘Q. And also, is not the three rocks at the end of the log in E, the particular log closest to the road (indicating), the same rocks?

‘A. Yes, they are.

‘Q. You testified, Mr. Heatfield, if I understood you correctly, that there was considerable——

Mr. Mack: The Court has stricken that answer so I don’t suppose I had better read it.

Mr. Morey: Since Mr. Mack is reading the cross interrogatories, I submit that part of the cross interrogatory should go in the record.

Mr. Mack: These were subject to all objections and if the question goes out——

Mr. Morey: He should not be permitted to use part of it and not all of it.

(Deposition of Tom Heatfield.)

The Court: I didn't strike that particular part. I permitted that question to be answered [170]

'Q. You testified, Mr. Heatfield, if I understood you correctly, that there was considerable—that there was about 500 or 600 pounds of earth removed.

'A. Yes.

'Q. And that was moved from the shoulder of the road. A. Yes.

'Q. By the shoulder, do you mean the top of the road?

'A. Yes. The shoulder of the road is the edge of the flat part of the road.

'Q. And it was moved down toward the lower part of the road? A. Yes.

'Q. Then you took exhibit—referring again to exhibit A, the same log as we have been talking about, and used it as a pry, or something, for some purpose?

'A. No, the log in exhibit A had nothing to do with operations at the scene.

'Q. Did any log in any exhibit A, B, C, or D, have anything to do with the operations, as far as you know? A. Yes, it did.

'Q. Which one?

'A. It is best shown in exhibit C. It appears in the picture as half buried by the dirt banked against it.

'Q. Why doesn't that show in A? Why don't that half buried log show—why, I wonder.

'A. It is just out of the foreground of the picture. [171]

(Deposition of Tom Heatfield.)

‘Q. How much longer picture, further front, would you have to go to show the same thing you say shows in C; how much longer picture?

‘A. Well, I would say that it wasn’t more than three feet out of exhibit A.

‘Q. What’s the reason for leaving it out of exhibit A, if any?

‘A. Exhibit A was intended to show the shoveling operations and the wheel marks of the car, not the log in question.

‘Q. Is, in fact, the log in question?

‘A. I say it was intended to show the shoveling operations and the wheel marks of the car rather than the log in question.

‘Q. How long is the log in question?

‘A. The log in question does not appear in exhibit A.

‘Q. If I understand you, the log is not in exhibit A at all. A. No.

‘Q. Not at all?

‘A. As I said before, I would estimate it was probably about three feet out of the foreground of exhibit A.

‘Q. Calling your attention to exhibit A, tell us what is, in reality, from the picture that you can see, ahead of the foreground as I call it, the pointed end, the small end, which is the end to the left of Mr. Rosslow in that picture; what you see in that picture, if anything—right up [172] here, the small end?

(Deposition of Tom Heatfield.)

Mr. Sugarman: Indicating the extreme rear, the top part of the picture, is that right?

Mr. Mack: That's right.

'A. It appears to be the general background of rocks, logs and brush.

'Q. How far up do you see rocks and brush in the background?

'A. Oh, I would say perhaps two or three hundred feet.

'Q. You are saying now, that that (indicating) is not the end of that particular log? A. No.

Mr. Mack: That is all.

Further Examination By Mr. Sugarman

'Q. Mr. Heatfield, what is your occupation?

'A. I am a field engineer.

'Q. By whom are you employed?

'A. Kaiser Company, Inc.

'Q. You are engaged in the occupation of field engineer right now? A. Yes.

'Q. And at the time you took these pictures and made this investigation, you were a field engineer?

'A. I was a field office engineer at that time.

'Q. Then you are not a photographer, are you?

'A. No.

'Q. What kind of a camera did you use to take these [183] pictures?

'A. They were taken with a 616.

'Q. Kodak or Brownie?

'A. The two pictures on July 3rd, were taken with a Brownie belonging to Fred Rosslow; the pic-

(Deposition of Tom Heatfield.)

tures taken on July 4th were made with my own camera, which is a German make.

‘Q. And now, Mr. Heatfield, do you know anything about perspective?

‘A. Considerable, yes.

‘Q. Do you also know something about viewpoint, do you not? A. I believe so.

‘Q. These pictures were not all taken from the same viewpoint, were they? A. No.

‘Q. For example, exhibit A was taken looking down the road in one direction, is that correct?

‘A. Yes.

‘Q. While exhibit C was taken in the opposite direction? A. Yes.

‘Q. On the other hand, exhibit E was taken from yet another direction, is that correct?

‘A. That’s correct.

‘Q. Facing the road? A. Yes.

‘Q. Now picture, exhibit A, was taken from a high- [174] er elevation than exhibit C, isn’t that correct?

‘A. Yes.

‘Q. It is also taken from a higher elevation than exhibit B, is that correct? A. Yes.

‘Q. When you get down to a lower viewpoint, objects may be hidden behind the foreground, isn’t that correct. A. Yes.

‘Q. That’s exactly what happened in your exhibit B, isn’t that correct?

‘A. That’s correct.

Mr. Sugarman: I think that is all—just a mo-

(Deposition of Tom Heatfield.)

ment—I might ask an additional question. I want to refer to exhibit C, the brush that appears and the logs that appear in the foreground of that picture, referring to the lower region of the picture, are lower, for example, than the large log that runs through the right hand side of the picture, isn't that correct? And, therefore, if they were viewed from the opposite direction, they would be hidden by that large log.

'A. Yes, from certain viewpoints.

'Q. Referring still to exhibit C, the earth that appears to the left as we view the picture, of this large log, is higher than the foreground of the picture, is it not?

'A. I don't know for sure, I believe it probably is. Apparently it is.

Mr. Mack: Just go ahead and read the next question. [175]

Mr. Morey: Further examination by Mr. Mack.

'Q. Do you know, Mr. Heatfield, whether Mr. Abrahams ever saw your Father at the place that this all occurred—that of course, would be that day.

'A. I believe he did not.

'Mr. Mack: That is all.

Mr. Morey: The deposition is signed 'Tom O. Heatfield'.

Mr. Morey: Plaintiff rests.

Mr. Mack: If the Court please, I have two gentlemen here, two doctors. I don't want to delay them.

The Court: Without waiving any right to make

any motion he may so desire, Mr. Mack may proceed to call the two medical witnesses.

Mr. Morey: That is satisfactory.

The Court: It is understood any motion Mr. Mack desires to make, will be upon the basis of the testimony up to this point.

Mr. Morey: That is satisfactory, your Honor.

[176]

DR. PETER REID

a witness, called for and on behalf of the Defendant, having been duly sworn, testified as follows:

Direct Examination

By Mr. Mack:

Q. Your name is Peter Reid? A. Yes.

Q. What is your profession?

A. Physician.

Q. And surgeon? A. Yes.

Q. And reside where? A. Spokane.

Q. How long did you reside here?

A. Since 1907.

Q. How long have you been practicing altogether? A. About 35-36 years.

Mr. Morey: We admit the doctor's qualifications.

Q. Where did you get your education, please?

A. At the University of Toronto, Canada.

Q. Were you present at the autopsy of Mr. Heatfield, July 10th, 1942? A. I was.

Q. Did you get a report of that autopsy?

A. I did.

(Testimony of Dr. Peter Reid.)

Q. Did you watch the autopsy yourself?

A. Yes, sir. [177]

Q. Personally? A. Yes, sir.

Q. Can you tell us who was present at that time, that you recall?

A. Doctor Lewis, Dr. Boyd, Dr. James Cunningham, Dr. Myhre, Mr. Morey, and another man, I don't recall his name.

Q. You think Dr. Myhre was there at that time?

A. Yes.

Q. And Dr. Finney?

A. Yes, and Dr. Snyder did the actual work of the autopsy.

Q. Dr. Finney is now where?

A. Interne at the Deaconness Hospital. And Dr. Snyder is Pathologist there.

Q. Doctor, for about how long did this autopsy take, approximately?

A. I judge it must have taken an hour and a quarter?

Q. That's just your opinion?

A. That is as I recall it now.

Q. What would you say, Doctor, based on that autopsy that you saw, if there was anything developed by reason of it and it alone, was there anything to determine the cause of death of Mr. Heatfield?

A. In my opinion, yes.

Q. From the autopsy itself? A. Yes.

Q. It was the autopsy of Mr. Augustus S. Heatfield? [178] A. Yes.

Q. Doctor, will you please tell the Jury what, in

(Testimony of Dr. Peter Reid.)

your opinion, was in the autopsy that disclosed his death?

A. Well, there was the condition of pathology in the heart which will produce death, angina pectoris. That is a condition we recognize as a heart condition which will cause death. I have seen autopsies of other people and this condition was there in Mr. Heatfield,—coronary artery had become hardened and particularly in this case the left artery, and reduced possibly one-half of what it would normally be. What happens under normal conditions the amount of blood flowing through that artery is sufficient to keep the heart muscle supplied with sufficient oxygen. Under certain conditions, of either severe exertion or rest—I will tell you in a moment where rest produces identically the same condition—if the heart is speeded up as in exertion, more oxygen is required in the muscle of the heart to keep it going and on account of the narrowed lumina of the coronary artery, not sufficient blood goes through and as a result it ends up in spasm of the heart muscle and these people will die from that condition. Now, peculiar as it may seem, absolute rest, as in deep sleep, may cause the identical condition of an attack of angina. When I say attack of angina, I mean this sudden cramping in the heart muscle, and the reason it does that is this—as he goes into sleep respiration becomes more shallow and heart rate falls and there is a certain degree of lack of oxygen entering the heart muscle. There is plenty to keep

(Testimony of Dr. Peter Reid.)

[179] going as long as he remains quiet, or if he wakes up in an hour, perhaps, and turns over, he exercises his muscle which results in bringing sufficient supply of oxygen and it goes on all right. If that man falls into a deep sleep, and we have that occurring right along, the degree of lack of oxygen in the heart gets beyond the danger period. It's quite plenty to keep going as long as he stays in a condition of absolute rest, but if he goes to turn over in his sleep and the heart muscle itself requires a greater supply of oxygen and with any amount of a narrowed lumina in the arteries which supplies that blood so that it can't get it, then it goes into a condition of contraction. Now this man will die from an angina attack sooner, or more likely, than a man who has an angina attack brought on by exercise, because where an attack is brought on by exercise, the first cardinal principle of treatment is to lay him down absolutely at rest, not move a single muscle if he can, and as the breathing becomes deeper and the heart rate becomes slower, he gets sufficient oxygen into the heart muscle and, of course, with morphine to relieve the pain, he begins to revive. The man who has an attack of angina in his sleep, the very condition of absolute rest and prolonged rest in sleep, has been the means of getting him into that condition, therefore, prolonged rest in this man was fatal. He needs a little exercise but the heart is already in spasm and he is the man who dies quickly. Could he get oxygen immediately, he might get better. This is the type of case that die

(Testimony of Dr. Peter Reid.)

at night, and when they get there, he is dead. [180]
In this man rest is what threw him into it—with the condition of his heart he was not able to get enough oxygen——

The Court: By 'this man' you mean Mr. Heatfield?

A. Mr. Heatfield had a pathology to produce that identical condition and that's the reason I base my opinion on the fact he died of an attack of angina pectoris.

Q. Is that a disease?

A. No. This comes from two words 'angina' means severe, cramp-like pain, and 'pectoris' means pertaining to the chest. It is simply a question of a disease, where the symptom is of such severity and outstanding, that the symptom has been designated as the disease because the heart condition, the pathology in the heart, will produce this severe, cramp-like pain in the chest, therefore, it is called angina pectoris. Angina pectoris is a symptom, a severe cramp-like pain in the chest, but produced by the pathology of the heart as I just described, sclerosis of the coronary vessels in the heart.

Q. From what you saw there, what is the fact, please, as to whether considerable exercise or any exercise, affected the condition or caused death in this instance?

A. Well, if exercise would influence it at all, the exercise would bring on the attack of angina at the time of the exercise when the need of more blood and more oxygen was necessary in the heart muscle. If

(Testimony of Dr. Peter Reid.)

exercise were responsible for the cause of angina pectoris, it would come on at the time of the exercise and not afterward. [181]

Q. If it come on at the time of the exercise, it would cause death?

A. Then, or soon afterward, if it were severe enough, it could cause death at the time,—there could be an interim, also, between the angina attack coming on and death. If the angina was brought on by the exercise, then it would be continuous from the time the attack came on following the exercise until death resulted.

Q. It would be a continuing state of angina?

A. Yes.

Q. And that means——

A. A terrifically severe pain in the chest.

Q. Is it possible for a patient to withstand that pain?

A. Well, he could withstand it, but he needs all the help he can possibly get, everyone I have ever seen, they ask for it and rightly so, because they have such a fear of constriction in the chest and fear of impending death, all of them, they want all the help they can get.

Q. Then, in the case where a man—assuming, please, he brings on this angina pectoris in the afternoon, around 5, or between 3 and 6 o'clock, and lies down an hour during that time, when, in your opinion, would the angina pectoris be sufficient to cause his death—doing nothing after 6 or 6:30 but rest—do I make myself clear?

(Testimony of Dr. Peter Reid.)

A. No.

Q. Assuming a man sixty-five years of age such as Mr. Heatfield was, and that he had never had any, never [182] done any hard labor, that his business was merely that of traveling solicitor, that he didn't know he had any condition—no difficulty with his heart—that his health had been reasonably good—very good—and that on the afternoon of the 30th day of June, 1942, he found himself off the road in an automobile which he was unable to move, couldn't be moved by himself, and that he then told a lady he had started his engine after he was in that predicament and tried to back his car up and run it forward, that he laid down there an hour, that it was a reasonably hot day, and that about 6:15 another automobile came in the opposite direction and he went out on the highway and motioned to them by waving his hand, to stop them, and did stop them, and they pulled him out; that he looked tired and worn out and that he then went a distance of 2 or 2½ miles and stopped to get a drink of water, and was asked if he wanted anything and he said he didn't think he needed anything, he took the drink of water and walked back to his car, which was a hundred yards, approximately, from the scene where he got the drink of water, and then half an hour afterward he screamed, and they went to him and brought him back to the camp, put him to bed with all his clothes on other than his shoes and his coat, talked to him until about 10 or 10:30 in the evening, and after that, he was found sometime later than

(Testimony of Dr. Peter Reid.)

that—dead—would the exercise I have related—oh I forgot one feature of it—he said to this man at the camp that he had over-exerted himself, would what I have related that he did have anything to do with his dying later in the evening? [183]

A. In my opinion, no.

Q. And you have related why.

A. Yes, sir.

Q. If it did have anything to do with his condition, doctor, when would his death have occurred?

A. His attack would have come on when the need was greatest on the heart, and would have continued. He might have died afterwards, but there would be symptoms of his attack of angina until his death, without any period in between of comparative comfort.

Q. In your opinion, doctor, from the examination, the autopsy and what I have related, the exercise took no part in it whatever.

A. That is my opinion.

Q. Whether he had exercised or not that particular afternoon this condition late in the evening or the next day, would have occurred, death would have occurred in any event?

A. I can't answer that question, but the pathology was there in the coronary artery of the heart so that condition might have happened that night or the next night, or a week afterward, but the condition was there, I mean the coronary artery was sclerosed and hardened and patches of fibrous tissue

(Testimony of Dr. Peter Reid.)

until it was about half the size the coronary artery should be.

Q. And if exercise brought on any condition of lack of blood coming into the heart it would be at the time of [184] the exercise?

A. The time when he required more blood in the heart.

Q. And the man would be in very severe pain?

A. Terrific.

Q. Was there any way to tell from the autopsy just as nearly as you can when this man passed away?

A. No.

Q. It would be somewhat of a——

A. It would be just a guess as to when it occurred, during the night, but it was possibly three or four hours afterward when he was pretty tired and sleeping soundly and the slowing down of the pulse rate and slowing down of the respiration until anoxemia brought it to a stage where slight exertion possibly turning over, threw the heart into a spasm.

Q. Due to no exercise in the afternoon whatever.

A. In my opinion, no.

Q. Did you observe in this man's autopsy any condition with reference to his aorta?

A. Yes.

Q. What did you observe?

A. Slight hemorrhage between muscle walls of the aorta, but extremely slight and possibly three or four inches away from the heart, but I considered it of very little significance at that place.

(Testimony of Dr. Peter Reid.)

Q. Would the fact there was a slight hemorrhage of the aorta aid in causing this man's death?

A. I don't see how it possibly could. [185]

Q. What was the cause of this hemorrhage, if there was any?

A. You have those hemorrhages coming in the little capillaries, capillary hemorrhages is all they are, in the tiniest blood vessels, sometimes we see them in the skin we find them in different organs but no connection whatever, or no break in the interlining of the vessel between that and the walls of the aorta at all—simply small capillary hemorrhage in this vessel wall.

Q. So in your opinion, his death was due to——

A. Angina pectoris.

Q. And it could have happened at any time?

A. I think so.

Q. And exertion wouldn't cause it?

A. Exertion could cause it——

Q. At the time of his passing on?

A. Not in this case, no.

Q. If it did cause his death in this instance it would have happened——

A. It would have happened when the exercise brought on the attack and that attack would be more or less continuing to the time of his death, whether an hour or four or five hours afterward—the pain continues, and the reason why the man is dying he is not getting over his attack, the heart is still staying in this contraction.

(Testimony of Dr. Peter Reid.)

Q. And all during this time he would be in very severe pain? A. Yes, sir. [186]

Q. What, in your opinion, could a man really do who was in this particular pain?

A. He is absolutely incapable of anything because of the fact the slightest movement makes the condition worse. The more he exercises the more the muscle becomes worse because he will have more and more call for oxygen to supply the heart muscle and more and more spasms continuing to keep him from getting it and he does exactly what we prescribed, absolute rest, can't get him to move a muscle or finger and all of this time he has this terrific sense of constriction about the chest and fear of impending death, incapable of exercising.

Q. Assuming he had this condition coming on by virtue of hard work or over-exertion, would it be possible for him to drive his automobile?

A. According to my opinion, no.

Q. He would have to remain in that particular place?

A. He would remain down on the side of the road and stay there so far as he was concerned.

Q. Would he desire a doctor?

A. In my opinion, he would very much.

Mr. Mack: You may cross-examine. [187]

Cross Examination

By Mr. Morey:

Q. I believe you said you said you attended this autopsy. A. Yes, sir.

(Testimony of Dr. Peter Reid.)

Q. I believe you were employed by the Standard Accident Insurance Company.

A. No, I didn't know that I was—I didn't know what company—Mr. Mack asked me to attend.

Q. You were paid by Mr. Mack?

A. I was paid by the Insurance company, they paid me afterward.

Q. And you were paid by Mr. Mack or the insurance company to attend this trial?

A. Yes.

Q. Now, Dr. Reid, did you examine this body quite carefully? A. Yes, sir.

Q. And did you come to the conclusion that afternoon that Mr. Heatfield had what you now call angina pectoris? A. Yes.

Q. Did you come to that conclusion that afternoon? A. Yes, sir.

Q. Definitely? A. Yes, sir.

Q. Was there any discussion with any of the other doctors who were there? [188]

A. I couldn't answer that, sir.

Q. Do you remember of one of those doctors examining that body make a laughing remark 'well, what did this man die from'?

A. No, I don't think anybody made any laughing remark, I am positive of that.

Q. Now, Mr. Heatfield had some hardening of an artery, or more than one artery?

A. Of the left coronary particularly, not much of the right.

Q. The left coronary artery?

(Testimony of Dr. Peter Reid.)

A. Yes, sir.

Q. Did you go up and examine that artery?

A. I saw it as it was cut, yes sir, I did.

Q. How much hardened was it?

A. It had produced lumena in that area about a half.

Q. Now, how many arteries are there leading to the mio-cardium? A. Two.

Q. You say that was on the left—and now how about the right?

A. There was very little hardening in the right, in fact no discernible hardening.

Q. So that Mr. Heatfield had about a fourth of the ordinary function of his arteries?

A. What do you mean?

Q. About a fourth of the ordinary of function of [189] his arteries.

A. He had three-fourths—he lost a fourth—the one on the right was functioning normally—excuse me for correcting you.

Q. Now, you have examined the bodies of many men of about sixty-five years of age. A. Yes.

Q. And did you not find, Dr. Reid, that the condition of Mr. Heatfield's arteries were about the same as the ordinary man of sixty-five years of age you have examined? A. No, sir, not at all.

Q. You think it was very much worse?

A. The right one was what you might expect, but not the left, positively not.

Q. Now, what he died of, in your opinion, was angina pectoris? A. Yes, sir.

(Testimony of Dr. Peter Reid.)

Q. And that isn't a disease.

A. That isn't a disease—the name angina pectoris isn't a disease as I explained. *It simply*, as I said, a symptom of such severity that it has been taken as the name of a disease.

Q. What did Mr. Heatfield die of?

A. Of a contraction of the heart muscle due to a lack of blood going——

Q. That might be called mio-cardial insufficiency.

A. I don't think so. You have got your terms mixed up. [190]

Q. In what respect is it different?

A. When there has been a degeneration of the muscle until the muscle is not sufficiently strong to carry on, when the muscle is insufficient to carry on the work.

Q. You never heard of mio-cardial insufficiency?

A. Mio-cardial insufficiency is not due to lack of oxygen, it's due to a degeneration of the muscle, possibly from an infected condition or mio-carditis which a man might have had any time.

Q. Would you say that was a contraction of the mio-cardium?

A. That's what happens when there is a lack of sufficient oxygen to keep the heart muscle functioning.

Q. What does it do?

A. It goes into a spasm.

Q. Was there an infarct?

(Testimony of Dr. Peter Reid.)

A. No, sir—in farct will cause a spasm in any muscle whether it is the heart or any place.

Q. When you have this contraction or spasm, you don't get infarct as a result?

A. May I explain, you are getting the Jury mixed up—they don't know what infarct is. That is sometimes called a plugging of the vessel which supplies the muscle. It cuts off the supply of blood and oxygen to the muscle and the muscle goes into a spasm.

Q. Now, doctor, in your opinion Mr. Heatfield died of angina pectoris, or what is the other name?

A. That is the commonly accepted name for it.

[191]

Q. Now those attacks come on frequently when a man is asleep, is that right? A. They do.

Q. Now, doctor, I think you said they come on after a man has been in a long sleep.

A. That would be more likely, to come on if a man had slept for four or five hours than if he had slept for an hour and then waked up and turned over for the simple reason he is awakened before the heart muscle has gotten to the stage of really being in danger of being thrown into a contraction or angina attack. He has turned over and the heart has speeded up, he breathes deeper. It depends on the degree of anoxemia——

Q. What does that mean?

A. Lack of oxygen.

Q. Now, how much of a contraction does a man

(Testimony of Dr. Peter Reid.)

have to have of this coronary artery to get this anoxemia? A. No one knows.

Q. It may be very slight or it may be almost complete?

A. I don't understand the question.

Q. In order to get this anoxemia, is that the condition from which he died when asleep?

A. He died from the result of that, the lack of oxygen, that is what brings on the spasm.

Q. You call that angina pectoris?

A. Yes, sir, when applied to the heart.

Q. Now, how much of contraction of the coronary [192] artery would he have to have in order to bring on this spasm when he dies in sleep?

A. No one could answer that question for you. That depends on a good many factors, on the amount of blood going through an artery, for instance, to a woman's heart which is smaller than a man's and requires less blood to keep it supplied with oxygen than a man who has a larger heart. It depends on the size of the muscle to be supplied, also depends on the amount of exercise a person does, it's all a matter of supply and demand.

Q. What is the other condition you mentioned in which people die? One time you say something about where they sleep for four or five hours, and then there was some other condition.

A. When exercise brings it on.

Q. In other words, angina pectoris takes its toll under two conditions, either the victim is asleep

(Testimony of Dr. Peter Reid.)

for four or five hours, or he has been exercising, one or the other, is that right?

A. That's right.

Q. It never happens unless it's one or the other.

A. Oh, yes, there is another condition; it may happen after a very full meal when what happens is this: he has taken a big meal and there is considerable pressure against the heart, the stomach requires more blood during more digestion than any other time, and that may also reduce the condition of lack of blood going to the heart.

Q. Is pain always a forerunner of angina pectoris? [193]

A. It's always present in angina pectoris.

Q. It has to be?

A. The pain is there whether it has to be or not, it is there.

Q. It's always there?

A. The pain is there always, every case I have ever seen had it.

Q. What kind of pain?

A. A severe, terrifically severe, cramp-like pain.

Q. Now, how long does a man have angina pectoris before he gets some warning of it?

A. Will you repeat that question?

Q. Let me withdraw that question and ask this one. Does a man always have warning of angina pectoris?

A. No. May I answer that a little differently? I believe he does have warning of angina pectoris, but he disregards it. He may have shortness of

(Testimony of Dr. Peter Reid.)

breath. He may have other symptoms in the area of the heart on exercise, but in five minutes it passes away. Now that may be the indications of angina developing.

Q. That's your own personal opinion.

A. Correct.

Q. Your personal opinion is when a man has died of angina pectoris there has been a period of time he has had some other pains in or about his heart?

A. I am just giving my own opinion, my own history of people who have had it, upon questioning them they may not have seen anything, or paid any attention to it [194] but everyone I have ever seen, when I have questioned them closely I have found they were not well. They had some slight pains around their cardial region and have disregarded it because in a few minutes they were gone. That has been my experience.

Q. How long would you say those pains had been lasting in those people?

A. Nobody can answer you that—it varies in different persons—it varies in length of time and it varies with the person himself. One person with a slight pain has been disabled to hear him talk about it—and another person would be rather stoic and disregard it.

Q. These pains come and go for a period of months? A. They may.

Q. They usually do?

A. I say they may, but they may not especially.

(Testimony of Dr. Peter Reid.)

I say the amount of complaining which a person does depends entirely on the person himself. When he gets a little attack he doesn't let one—and someone else may make a great to-do about it.

Q. Let me put it this way—here is a man sixty-five years of age that has never had any pain about his heart, never complained of heart trouble, so far as he is concerned, he has been OK and on one afternoon in June he is alone on this road and his car runs off the road. He is alone and the car is in a tough spot near rocks and logs and one thing and another and the evidence shows that this man did some work to get that car back on the road, just what it [195] was we don't know, but we do know that there has been some dirt shoveled there and we know he has told some people that came along, a lady that came along, he had worked for two hours on that car—and then couldn't get it back on the road, and when these people came along—

The Court: Not that he worked for two hours—that he was there for two hours. He worked for an hour and then was in such condition he had to lie down for an hour.

Mr. Morey: And the kind of work he did was definitely told——

Mr. Mack: He said he moved the car back and forth——

The Court: If you care to make an objection, don't argue to the Jury, make your objection to the Court.

Q. (Continuing) Dr. Reid, you have heard the

(Testimony of Dr. Peter Reid.)

testimony about the history of this man and that when one of these persons came along there he appeared to be worn out—he was holding his hands over the front part of his body—and that about 6:15 he left them and drove about two miles to a camp to get some water, and he went from the camp back to his car then was stretched out on the ground by his car, evidently in agony——

Mr. Mack: I object to that, there is no testimony to that effect——

The Court: When he completes his question you may make your objection. Please don't argue to the Jury [196] all the time.

Q. (Continuing) ——he was out by his car and the boys at camp heard a call for help and went out there and they assisted him into his automobile and took him up to the camp. When he got out at the camp he was leaning over in a stooped condition and vomiting, or attempting to vomit, and he was put to bed that night, and died sometime that night. Now, then, Dr. Reid, do you mean to tell this Jury that if it's a fact that that man was doing that amount of work on the automobile, that it had nothing to do with his death, do you mean to tell the Jury that?

A. Yes, sir, I do.

Q. You mean to tell them that had absolutely nothing to do with his death?

A. In my opinion, he did not have an attack of angina at that time for the reason I have already stated to you.

(Testimony of Dr. Peter Reid.)

Q. Is vomiting always a precedent to a fatal attack of angina pectoris? A. No.

A. Vomiting is a thing that may happen in any number of diseases.

Q. No, as a matter of fact, doctor, you don't very often find vomiting before a man passes out with angina.

A. I just finished telling you that isn't a symptom [197] connected with angina. I do say that vomiting is a condition which comes from such a variety of causes it of itself means nothing particularly.

Mr. Morey: That is all.

Re-Direct Examination

By Mr. Mack:

Q. What is the size of the artery through which the blood goes into the heart—the diameter of it?

A. Well, I don't know if I can describe it to you. It varies with different hearts considerably. I don't know how to describe it. But perhaps it's about, well smaller than where the steel stops in a pencil, about that size.

Q. What diameter would that be?

A. Well, I'd have to get down to measuring millimeters to get that.

Q. Now, with reference to the lead in an ordinary pencil.

A. It would be possibly 1/12th of an inch, possibly about that size, just roughly.

Q. In diameter? A. Yes.

(Testimony of Dr. Peter Reid.)

The Court: (Q) From your experience, doctor, how many people out of a hundred die with the first angina attack?

A. Well, your Honor, I can't give you those figures offhand, but quite a number do die even with their first attack; it somewhat depends on how soon some [198] sort of treatment is given to them—I can't get the percent.

Q. I am talking about those who die in their sleep.

A. I can't give you that percentage just now.

Q. Is it large or small?

A. The ones that die wake up out of their sleep, they don't die in their sleep, these people are always awake, they are awakened by the attack but quite a number of them, more of them, die than the ones who have an attack brought on by exercise, that's been my experience.

Q. I am talking about the first attack.

A. I can't give you the percentage of those offhand, no, sir.

Q. Well, is angina a disease which ordinarily, by itself, results in the death of the person attacked? A. No, but it may.

Q. What do you think this man had that afternoon out there?

A. It's rather difficult to say what was the matter with him. To me it was definitely not a distinct attack of angina, or not brought on by the exercise he did, following his exercise.

(Testimony of Dr. Peter Reid.)

Q. The heart trouble he had that afternoon was not angina.

A. It might have been a forerunner, but [199] wasn't a real, distinct, definite case of angina.

Q. Do you feel whatever he had that afternoon was caused by the exertion?

A. That's quite possible because following exertion people very often vomit, over-exertion alone will sometimes do it.

Re-Cross Examination

By Mr. Morey:

Q. These people that die in their sleep from angina, do I understand they have a pain while they are asleep? A. No, not at all.

Q. Do they have a pain when they awaken out of their sleep? A. Yes, sir.

Q. What *would say*, in your experience, how long it is before the person dies?

A. They die very quickly. They are dead usually before we get there.

The Court: (Q) Do you think a man could be sleeping in a room with a number of people, fifteen or twenty feet away from him, wake up with angina and not say anything about it, any signs?

A. I think he did.

Q. How severe is that pain when they wake up?

A. It's a terrific pain, terrible.

Q. Assuming this man we have been talking about, [200] when somebody went to his cot, bunk, the next morning and the covers were not disarranged, would that mean anything to you?

(Testimony of Dr. Peter Reid.)

Mr. Mack: I object to that, your Honor—

The Court: Objection sustained.

The Morey: I thought that was in the evidence.

The Court: There was no testimony as to that.

Q. A man waking up and dying with this angina pectoris, he is apt to be in such pain he is likely to say something about, isn't that true?

A. I would say if he lived long enough he would say plenty, but it depends again on the degree of muscular spasm which has developed in the heart. If an extreme degree, he would die practically the same as with an embolism which plugs the heart entirely.

Q. It would have to be an embolism following angina? A. No, no, before.

Q. But does a man die under these conditions: the arteries are somewhat sclerosed, the man is sixty-five years of age, and he had had some extra heavy exertion, now then I want to ask you if there is a thing, or maybe I asked you this before, if there is such a thing as mio-cardial insufficiency?

A. Yes, but that is an entirely different disease.

[201]

Q. Does this mio-cardial insufficiency show up in the post mortem?

A. If that is present in the heart, very definitely so, yes, but it is a different condition entirely.

Q. The first time that that condition comes on, I mean the first time that man sixty-five years of age doesn't get enough oxygen to his heart, there is a spasm in the heart muscle. A. Correct.

(Testimony of Dr. Peter Reid.)

Q. If that spasm is enough of a spasm it might cause him to die the first time he had it.

A. It could, yes.

Q. What you say is mio-cardial insufficiency—

A. I refuse to allow you to put that mio-cardial insufficiency to this condition—they are not alike at all.

Q. I know you say they are not, but there is such a thing as mio-cardial insufficiency.

A. Correct.

Q. And a man may die of the first attack?

A. No, because he doesn't have a mio-cardial insufficiency right at the time—that is a process which comes on over a fairly long period of time.

Q. Do you mean to tell me it can't happen—a man cannot die of mio-cardial insufficiency the first time? A. Yes.

Q. You mean it couldn't happen if enough oxygen does not get down into the mio-cardium so as to cause death, is that what you mean? [202]

A. Mio-cardial insufficiency is not lack of oxygen. It's not a term applied to a muscle deprived of sufficient amount of oxygen, it's simply where a muscle is not sufficient, it's lost its tone but it does that over a period of time.

Q. How long a period has to happen before a man passes out? A. No one knows.

Q. It can't happen at the first attack?

A. No, positively not.

Mr. Morey: That is all.

(Testimony of Dr. Peter Reid.)

Q. (By Mr. Mack) Would the fact that Mr. Heatfield after this other car came up to aid him, had his hand on his abdomen signify anything at all? A. It might.

Q. What would it signify?

A. He might have some disturbance there, that is perfectly true.

Mr. Mack: That is all.

Witness Excused. [203]

DR. D. H. LEWIS,

a witness called for and on behalf of the Defendant, having been duly sworn testified as follows:

Direct Examination

By Mr. Mack:

Q. What is your business?

A. Physician and surgeon.

Q. License to practice in the State of Washington? A. Yes.

Q. How long have you been practicing?

A. Thirty-six years.

Mr. Morey: We admit the doctor's qualifications.

Q. You have had, in that time, considerable experience?

A. Thirty-six years of it ought to be enough.

Q. Were you present at an autopsy of Mr. Augustus S. Heatfield? A. Yes.

(Testimony of Dr. D. H. Lewis.)

Q. Besides yourself, do you recall who was present?

A. Dr. Reid, Dr. Snyder, Mr. Morey, Dr.—may I refresh my memory please? (Witness refers to memorandum) Dr. Finney and Mr. Zappone.

Q. And Dr. Cunningham?

A. Yes, James E. Cunningham.

Q. Dr. Boyd? A. Yes.

Q. You watched the autopsy, did you not, yourself? [204] A. Yes.

Q. From beginning to end? A. Yes.

Q. About how long did it take?

A. Those autopsies take from an hour and a quarter to an hour and a half.

Q. It was carefully done? A. Yes, sir.

Q. From the autopsy itself was there anything to show what was the cause of the death of Mr. Heatfield?

A. The definite cause of death, no, no one could tell.

Q. What, in your opinion, did cause the death from what you saw there at the autopsy?

A. He died from natural, senile causes, — in other words, the body just gradually broke down.

Q. What particular causes do you refer to in the body, what particular condition?

A. Well, he had some oedema of the brain and some of the same thing of the lung, he had sclerosis of the right coronary artery, I think it was the right, and he had some sclerosis all over the whole blood stream.

(Testimony of Dr. D. H. Lewis.)

Q. Did you observe the aorta?

A. The aorta had some slight hemorrhages scattering, not out of the ordinary, little capillary bleeding, not a great amount of blood lost. There wasn't a great amount of blood at the autopsy in the aorta.

Q. Did the condition of the aorta itself disclose any other condition showing the aorta might have caused his [205] death? A. No, sir.

Q. Would the fact that he died after 10:30 in the evening—would the fact he had been exercising to the extent of over-exertion, or looked tired and worn out, have anything to do with his death?

A. You couldn't call that a cause of death, no.

Q. Would the fact that this man was sixty-five years of age, you knew that, did you not, and that prior to that time he had been in fairly good health as far as he knew, doing no laborious work, usually traveling in a car or in a train, that about three or a little later in the afternoon his car was off the highway, in an unmovable situation, and that while in that position for an hour or so, with the engine running in the car, he was attempting to back it up and run it forward, and he became tired and weary—that he had stated that he had been attempting to move the car back and forward—that he might have done considerable work to get the car on to the highway—that he looked somewhat exhausted, that he was pulled from the road, that he drove a distance of approximately two miles or a little farther, he stopped and walked a dis-

(Testimony of Dr. D. H. Lewis.)

stance of a hundred yards and asked for a drink of water, he was given a drink of water and asked if he wanted anything and he said no, he went back to the car, he seemingly held his head down, held himself over in a stooped position, walking kind of bent over, and a half hour after getting back to the car he called for help or made some sort of noise or screamed for help, that they came to [206] him and took him back to the camp, put him to bed in his clothes with the exception of his shoes and coat being removed, that it was a hot day, that he talked to them until about 10 or 10:30, and that he died sometime after that—would you say the exercise he did that I have outlined had anything to do with his death?

A. Well, I couldn't say it didn't or I couldn't say it did, but exercise of that type would be apt to have a bearing if there is some diseased condition in his body prior to this exercise you are speaking about.

Q. Did you find any such diseased condition?

A. Only just in a general way. There was no definite pathology in this man's body.

Q. Can you give us a name in your opinion—what in your opinion he died of?

A. Well, most probably the thing he died of was angina pectoris. Now that's a hard thing to prove, I couldn't definitely state he did or did not.

Q. You heard Dr. Reid's testimony?

A. I heard it.

Q. Will you tell us what is meant by miocardial?

(Testimony of Dr. D. H. Lewis.)

A. Mio-cardial of the heart muscle—is a degeneration of the muscle of the heart. It has nothing to do with blood supply.

Q. Does it have anything to do with the oxygen supply?

A. Except that where we find scar tissue in the heart muscle, it doesn't have the elasticity—it's like an [207] old spring which doesn't have the elasticity of a new pair of springs. If you have scar tissue it doesn't have the squeeze to it the normal mio-cardium has.

Q. Is that a process of a number of years?

A. Oh, yes, it can be even from birth.

Q. The fact that a man tries to vomit—does the fact he tried to vomit establish any particular difficulty?

A. Vomiting in any disease is a psychic thing, for instance, you may hurriedly eat a meal, you may get a telegram with bad news, you may become nauseated and vomit, there is nothing wrong with you, it's just a psychic thing—I was going to call it neurotic. In other words, there is no pathology to it.

Q. What is an embolism?

A. It's a blood clot that is carried by the blood obstructing the circulation.

Q. Can an embolism cause death?

A. Oh, yes.

Q. Is the death slow or rapid?

A. Very rapid.

Q. Now, with reference to angina pectoris, do people die in their sleep of that?

(Testimony of Dr. D. H. Lewis.)

A. Let me explain angina pectoris in my way. Angina pectoris is a spasm of the heart muscle. Now, the heart beats rhythmically, it contracts and expands, and so forth, now, if that contraction becomes a spasm and doesn't allow the heart to expand, shuts off all the oxygen to come [208] to that particular blood stream and they die in a very few seconds.

Q. Is that occurrence usually when one is asleep or when awake?

A. It usually comes on them when a person is awake and they die very suddenly.

Q. Does it come on them when they are asleep occasionally? A. Yes, sir.

Q. Could he die quickly in his sleep?

A. It doesn't take very long for that muscle contraction and not expanding—just a few seconds and they are gone.

Q. What is the pain, if any, during—while the patient is awake, affected by this angina pectoris, if any?

A. Angina pectoris ordinarily is a long continued line of pains. Extremely terrific pains. If the spasm is hard enough to hold that muscle right down they die so quickly they don't have any time to yell. One particular thing about angina, they can have all the symptoms over a long period of time and not know it is angina pectoris—call it indigestion, gas pains, liver pains, and so forth.

Q. Those pains under the conditions you have

(Testimony of Dr. D. H. Lewis.)

just announced, are they as terrific as when they really have angina pectoris?

A. When you have a real spasm, it's terrifically painful, no doubt about that.

Q. If the angina pectoris such as you have outlined [209] came would it be brought about by exercise?

A. Of course, no one knows the exact cause of angina pectoris, but we all believe—I believe you can't have an angina unless you have a basic pathology behind it. You can't have an angina pectoris in a normal heart—I don't believe you can.

A. This pain can be removed—something can be done to remove that pain?

A. You can give a dose of morphine is about all I know of, and rest.

Q. And if a person is at rest for about four or four and a half hours, can the angina pectoris take him at that particular time after he has rested for four and a half hours, after he lies down on a cot, for instance?

A. It can. The reason we believe angina causes death at the time of rest is because if a patient hasn't time to kind of bring himself to, to start that heart going again, if you will just take your fist and squeeze your fist down like that (indicating) quite hard for just a few seconds, the fingers become numb and it is pretty hard to straighten them out, and of course the longer you hold them down the harder it is to straighten them out and there will come a time when you can't extend your

(Testimony of Dr. D. H. Lewis.)

fingers at all—that is what we think happens in angina pectoris in the muscle, death comes in a few seconds or minutes.

Q. In this particular autopsy and the outline I have just given to you, in your opinion did the exercise have a thing to do with this man's departing from this life? [210]

A. I couldn't say. I don't know. I don't think so.

Q. Your opinion is it did not.

A. I don't think anything more to do with it than a full meal or a strained bowel movement would have to do with it.

Q. If he died after a full meal or a strain, how long would he live from angina pectoris?

A. If he died from a heart spasm he died right now, I mean from the attack itself. The cause of the attack I don't know how long that would take.

Q. What is coronary occlusion?

A. That is a blocking of the coronary arteries, the arteries that feed the heart itself.

Q. That's a foreign substance, a kind of a blood clot.

A. Yes.

Q. And that blocks the artery?

A. Yes.

Mr. Mack: You may take the witness.

Cross Examination

By Mr. Morey:

Q. Dr. Lewis, you were employed by one of the insurance companies to attend that autopsy?

A. By Mr. Mack.

(Testimony of Dr. D. H. Lewis.)

Q. I thought you were employed by Crum-packer.

A. Wait a minute now,—I believe he did call me.

Q. You did go down to that autopsy to find out [211] what caused Mr. Heatfield's death.

A. If we could.

Q. That's what you went there for.

A. Yes.

Q. And you have been practicing here in Spokane for quite a long while? A. Yes, sir.

Q. I don't say this with any reflection, you represent insurance companies quite a good bit.

A. Yes, sir.

Q. So when Doctor Lewis went down to that autopsy he went down there intending to do a good job for your client?

A. I went down to find out the fact.

Q. You went down as you always do, to find out the facts. A. Yes, sir.

Q. And while you were down there, for an hour and a half, you did pay particular attention to see what caused Mr. Heatfield's death.

A. Yes, sir.

Q. You went up and looked at that artery?

A. Yes, sir.

Q. And you never saw in there any sclerosis so that it was half its size, did you?

A. Well, neither one was entirely involved, no.

Q. And the right coronary artery was entirely all right, wasn't it? [212]

(Testimony of Dr. D. H. Lewis.)

A. I think it was, the right——

Q. ——one was entirely all right. A. Yes.

Q. And the other wasn't sclerosed very much?

A. If I remember about half.

Q. Now, Doctor, you made no diagnosis, if diagnosis is the correct term to use with a man who has passed on, you made no diagnosis of angina pectoris did you? A. No, sir.

Q. Definitely in your own mind, you said to yourself 'that man didn't die of any angina pectoris'.

A. No, I didn't say that. I didn't make a definite diagnosis. There were too many pathological findings here to pin myself to the cause of death.

Q. Isn't it a fact down there that afternoon, you, Dr. Lewis sais 'what did that man die of?'

A. I wouldn't doubt it at all.

Q. You wouldn't say you didn't say that?

A. No.

Q. Because you were very much in doubt what caused Gus Heatfield's death.

A. I am not sure yet what he died of.

Q. Now, you were not able at that time to find anything that caused him to die and you haven't ever been able to find anything that caused him to die. Now, Doctor, tell the Jury what did cause him to die.

A. You might as well ask how long is a piece of rope. That man had a lot of senile change, any one or two [213] or all of them could cause or-

(Testimony of Dr. D. H. Lewis.)

dinary death, and I cannot put my finger on any specific one of them, no I can't.

A. Now then, doctor, when you use the word senile what do you mean in term of years, please?

A. Well, you can't answer. Some men are older at fifty than others at seventy-five. It's a change that goes on in his body. The elasticity of his muscles becomes fibrous, hardened, hardening of the arteries, brain cells not quite so acute, don't walk with a fast step like he used to, don't enjoy his meals like he used to, just ordinary senile changes.

Q. It's somewhat of a relative term—a man might be senile at sixty-five and another senile at fifty? A. Yes.

Q. You think now that Gus Heatfield just died from senile changes?

A. I don't know what he died of, I can't say.

Q. Well then, so far as your opinion today, you don't know what he died of?

A. He died of that combination, if you are going to pin me down to any one, I can't tell you. I can theorize but that doesn't get very far.

Q. Your best guess is, senile change, a combination of hardened arteries and something else, but a combination of old age changes. Doctor, let me ask you this question, please. Is it just a thing that happens right along, I mean before a man dies of senile change, he just lies down and dies, or is he usually very sick at his [214] stomach?

(Testimony of Dr. D. H. Lewis.)

A. No, as I said a while ago, you can have nausea from a thousand and one different causes.

Q. We are talking about a man dying of senile changes. When you get death from senile changes isn't it a fact you get the history of a man that does gradually peters out?

A. Not necessarily. These sudden deaths we don't know what causes it. Apparently a man is well and fine immediately before. One of our doctors died of hiccoughs.

Q. You would call it an accident?

A. I don't know what you would call that, just a tragedy, that's all. These changes go on just like a pipe in your sink, it becomes gradually plugged up, it works all right, when suddenly the water stops going through, that's senile change.

Q. See if these things are consistent with death by senile change: here is a man sixty-five years of age never heard to complain of any illness, active in business every day, making trips up here in the country, to Colville, and Curlew, and calls on his agents up there at Republic, and everything is fine and dandy, and then he is going over to Colville and somehow or other he gets off the road, he is alone; he evidently does some kind of work trying to get the car back on the road and somebody comes along and gets him back on the road and finds him tired out, worn out, and this man says to this party 'I have been here for about [215] two hours and I got so tired working I had to lie down', and he said to another party there at the

(Testimony of Dr. D. H. Lewis.)

same time 'for the first time in my life I had pains about the heart', and he was holding the front part of his body down here (indicating), and then he got in his car and drove two miles to the forest ranger's camp, and was taken in there, he was sick when he got there, he was put to bed and he died in the night. Now, doctor, that wasn't just death of senile change, was it?

A. I couldn't say the overexertion didn't have anything to do with the death. Nobody can, any more than a full meal eaten hurriedly—I wouldn't say that senility, but take a man of my age, say, I am not as active as I was twenty years ago and I would say if I did that those were the effects I would expect.

Q. With that history of exertion and his death following that, wouldn't you rather say that death was caused by the exercise than say the death was caused simply by senile change.

A. No, I wouldn't want to say.

Q. You don't want to commit yourself on that. What is mio-cardial stenosis?

A. Stenosis is just a narrowing, coronary stenosis is just a narrowing of the coronary artery.

Q. Doctor, isn't it in your opinion a possibility that if a man's coronary arteries are sclerosed to some extent, to the extent we will say you discovered in Mr. Heatfield, isn't it a possibility that if that man does some unusually heavy, hard work that the blood doesn't carry enough oxygen to the

(Testimony of Dr. D. H. Lewis.)

[216] heart muscle for the heart muscle to work and isn't it possible that the heart muscle calls out for more oxygen and doesn't get it, the heart muscle just fades out?

A. I wouldn't look for sudden death in that instance. If he had a partial occlusion of one of the coronaries and the other coronary is wide open, you don't expect those things to cause sudden death. There is enough blood going through there to carry enough oxygen for the ordinary body at rest.

Q. Does each artery supply a separate portion of the mio-cardium?

A. One supplies one-half and the other one-half, but inter-related by small capillaries which join them. He could have the left one cut off entirely and put the heart at rest enough the other would supply enough for both.

Q. Doctor Lewis, you said you don't very often have spells of vomiting during an attack of angina pectoris.

A. You can have vomiting with any kind of pain, either physical or mental.

Q. Does angina always have pain?

A. Yes, sir.

Q. You can't have angina without pain?

A. When I am talking about angina pectoris I am talking about a heart spasm, a spasm of the heart. I believe there are certain degrees of angina where you have a pain, when you say the pain is very very extreme—but if you get real angina pectoris, that pain is terrific, nothing like it.

(Testimony of Dr. D. H. Lewis.)

Q. You mean the spasm sufficient to cause a man to pass out. [217]

A. No, he don't always die of angina pectoris.

Q. But if they do they have had a very extreme pain.

A. The pain can be so short and death so quickly he hardly realizes it.

Q. This thing doesn't happen very often when a man is asleep?

A. I haven't seen very many of them.

Witness Excused.

The Court: Have you any other testimony, Mr. Mack?

Mr. Mack: I am resting here.

The Court: Is there any rebuttal?

Mr. Morey: We rest.

The Court: Do you wish to make some argument on your motion?

Mr. Mack: Not a great deal.

The Court: I don't see how you can present your motion with any degree of thoroughness and start your argument this afternoon. I will excuse the Jury until 10:00 o'clock tomorrow morning.

Whereupon: The Jury is excused until 10:00 o'clock A. M., April 16th, at which time, all parties present, the trial was resumed. But before Court was adjourned, the following proceedings were had.

The Court: Are you making this motion as coming at the close of Plaintiff's case?

Mr. Mack: Yes, and I will renew it. Comes now the Defendant in the above entitled action and moves [218] the Court to dismiss the same and to render a verdict for the Defendant for the following reasons:

First: That no notice of any claim for accident was given by the Plaintiff within the twenty days required by the policy, it definitely providing that notice thereof shall be given within the twenty days.

Second: There is no evidence or inference from the evidence that Augustus S. Heatfield had over-exercised, over-exerted or in any manner strained himself whatsoever:

Third: That there is no evidence of death in this case whatsoever by accidental means, or that the same was violent or exclusive of ordinary death.

That the evidence totally fails to establish the cause of death of Mr. Heatfield insofar as the Plaintiff's case is concerned.

That the only evidence in this case as to any accidental means is based upon the admission by this Court of the testimony being on the theory that it is a part of the *res gestae*, and to be a part of the *res gestae* it is obligatory that the proof be made by statements of fact and not statements of conclusions, and under the entire record up to this point, the Plaintiff is not entitled to recover.

Whereupon: After argument on the above motion to the Court, the motion was, by the Court, denied and exception allowed.

(Whereupon the Court adjourned to 10:00 o'clock A. M., the following morning for argument to the Jury.) [219]

April 16th, 1943

10:00 A. M.

After argument to the Jury, the Court gave the following instructions:

Judge Schwellenbach: You have heard the testimony and the arguments of Counsel, and it now becomes the duty of the Court to instruct you concerning the issues in the case and the law involved in those issues, and as it is my duty to give you these instructions it is equally your duty to accept these instructions as being the law. As I told you the other day there is a sharp distinction between the work of the Court and the work of the Jury in the trial of a case. We, neither one of us, have the right to infringe upon the scope of the other. I have no right to interfere with your decision on a question of fact. You have no right to interfere with my decision on questions of law. Your work is more important than mine because if I make a mistake, either in the trial or in these instructions, there is a court down in San Francisco that can correct my mistakes. If you make a mistake in passing on a fact, there is not any court who can correct that mistake.

You will consider the instructions as a whole and not place any undue emphasis on any particular portion of them.

You are exclusive judges of what is the evidence in the case and the weight and credit to be given the testi- [220] mony of each witness. In doing this you may take into consideration the conduct, appearance and demeanor of the witness while testifying; his or her apparent candor and frankness, or the lack of such qualities, if any such lack appears; the reasonableness or unreasonableness of the story told by the witness, its probability or improbability as measured by your common experiences in life, the opportunity or lack of opportunity on the part of the witness of knowing or being informed concerning the matters about which he or she testified, the intelligence or lack of intelligence displayed by the witness, the interest or lack of interest on the part of the witness on the outcome of this case, his bias or prejudice, if any, which would cause him to warp his testimony or color it one way or the other. If you find from the evidence that any witness has wilfully testified falsely to any material fact in the case, then you are at liberty to disregard the entire testimony of such witness except insofar as it may be corroborated by other credible evidence. You must not individually as a Juror, or collective, permit sympathy or goodwill, like or dislike for either party in the action, or passion or prejudice against either party in the action to influence you in arriving at a verdict.

There are cases in which it is necessary to resort to circumstantial evidence. Such necessity inheres in the very nature of things. By circumstantial evidence is meant the inference of the facts in

issue which arise as a natural or logical consequence according to reason or common experience from established collateral or related facts. [221] In order to justify a verdict on circumstantial evidence not directly proving the facts in issue, the circumstances necessarily must be established to the satisfaction of the Jury by a fair preponderance of the evidence, and reaching a verdict on circumstantial evidence is never warranted where the evidence is as consistent with some other conclusion that that contended for by the party introducing the circumstantial evidence.

During the course of this trial each side has presented the testimony of men known as experts, doctors. An expert witness is one who is skilled in one particular matter, being possessed of some particular skill or knowledge concerning the matter under inquiry, by study, observation, practice or experience. Where the testimony of an expert is given as to something that can be seen and observed by any witness, physical objects and their conditions, his testimony is to be viewed as that of any other witness, giving consideration to the particular fitness he may have bearing on the accuracy of the observation on his part over the ordinary person, but in so far as the testimony of an expert is the expression of an opinion based on testimony introduced you must first find from the evidence the facts on which such opinion is based are true. Where a witness testifies as an expert in any particular field and is called to the witness stand and allowed to express an opinion rather than testify as to facts,

those opinions are for aid and assistance to the jury and not for the purpose of invading the functions or province of the jury. Your duty is to evaluate and weigh the testimony of the [222] witness who expresses the opinion precisely as I have outlined to you as to any other witness.

I have permitted the testimony of the young Mr. Heatfield as to certain conditions on the highway at the point at which the plaintiff contends the car of the deceased was off the road. It is admitted that he decided upon the point without the aid of any person who was there at the time the automobile was there, if you should find the car was there. The question of whether you should accept or consider the testimony in Mr. Heatfield's deposition is one solely for your own decision. Unless you find from all the testimony that the young Mr. Heatfield did testify as to the conditions at the same point as that testified to by Mr. and Mrs. Harrington you will not consider his testimony.

The issues are made up of what is known as the pleadings. You will take them with you to the jury room. They are not evidence, but simply a summary of what each party expected to prove when the pleadings were prepared.

The plaintiff's pleadings consist of a complaint, bill of particulars, and the reply. The defendant's pleadings consist of an Answer. In the complaint the plaintiff alleges that during his lifetime and at the time of his death Mr. Heatfield had a certain policy of insurance which was in force and effect at the time of his death. There is no dispute about

that, and no issue concerning it. Plaintiff alleges that she, Edna L. Heatfield, [223] was the wife of Mr. Heatfield, and that she is named as the beneficiary. She brings this suit upon that basis. There is no dispute about those facts. She alleges that he died on June 30, 1942, and there is no dispute about that. Then she sets forth the particulars about the cause of his death, and alleges he died accidentally under the terms and provisions of the policy. Those are denied in defendant's answer. She alleges she complied with the terms of the policy in furnishing proof of loss as required by the policy. That is denied by the answer. And in the answer there are certain affirmative defenses set up which raise the question of the notice of the proof of loss. There is no dispute of the fact, nor is there possible inference to be drawn from the facts concerning notice of proof of loss. Whether or not the notice was a proper notice is purely a question of law and I decided that question. I decided it was a proper notice and proof of loss had been furnished in this case, so far as the affirmative matter contained in the answer and so far as the reply is concerned you need not bother yourselves with them. They simply raised issues of law which have been decided in favor of the plaintiff by me. You, alone, have the right to decide what is the evidence in the case and from such evidence to arrive at your own conclusions concerning the contentions of both sides as to each of the issues which the evidence presents. In reaching such conclusion you are entitled to take into consideration the bur-

den the law places on the plaintiff [224] in a case of this type to sustain her position by a fair preponderance of the evidence, and the expression 'fair preponderance of the evidence' means the greater convincing force or weight of the evidence. It means that which appears to you as the more reasonable and the more probable. It doesn't necessarily mean the greater number of witnesses testifying to or against a given proposition or claimed fact or series of facts, nor does it make any difference on which side the evidence is offered. It means taking all the evidence upon that issue into consideration, no matter which side may have offered it, and the party who has on his side of any particular issue that convincing weight, that proving force, is said to have a preponderance of the evidence in his behalf. If you find the scale equally balanced on any issue then you must decide that issue in favor of the party in whose behalf the evidence is offered. The burden rests on the plaintiff to establish her contention as to the issues which I will now outline to you.

This case presents two issues for the jury to decide. First, what was the cause of death, was it the result of natural causes as contended by the defendant and its witnesses—if so the plaintiff is not entitled to recover. On the other hand if you believe that the plaintiff has sustained the burden of proving that her husband's death was caused by the exertion in attempting to move his automobile, then you will consider the question as to whether such death was accidental as defined [225] by the pol-

icy. At this point I instruct you that the fact the deceased may have had a disease of the heart will not of itself prevent a recovery by the plaintiff in this case. If the disease merely contributes to the death after being preceded by an accident such disease does not prevent recovery under the insurance policy. What the plaintiff must prove in a case of this kind is that the accident was the direct and proximate cause of death. The question is did an accident set in motion a train of events which brought about death without the intervention of any force operating or working from a new and independent source. If you find in this case that over exertion was the direct and proximate cause of the death, your second question was to decide is whether what happened to the assured was accidental within the meaning of the policy. Here, again, the plaintiff has the burden of proof. The policy says that one may only recover if death is effected directly, exclusively and independently of all other causes through accidental means. In interpreting this clause the law is we must consider this from the point of view of the average man. Death by accident means death from an unexpected, something which happened by chance, something unforeseen, extraordinary and unlooked for. An effect which was the natural and probable consequence of an act or course of action is not an accident. It is either the result of actual design or falls under the maxim every man must be held to intend the natural and probable consequences of his deeds. To

be an accident [226] the act must bring about an effect which is not the natural and probable consequence of the means which produced it, an effect which does not necessarily follow. If you find in this case the plaintiff has sustained her burden of proof as to both of these points, first, that the death was caused by over exertion, using the definitions I have given you, and, second, that the death was accidental then your verdict should be for the plaintiff. If you find that the plaintiff has failed to sustain the burden of proof as to either of those two points then your verdict must be for the defendant.

When you retire to your juryroom to consider of your verdict you will select one of your members as foreman who will preside over your deliberations and represent you in further conduct of the case in court. You will take with you the pleadings and the exhibits in the case. It will require the concurrence of the entire jury to arrive at a verdict. You will take with you two forms of verdict, and my reading the one before the other is no indication of any idea I may have about it. The first form is a form for the plaintiff and reads 'We, the jury in the above entitled cause, find for the plaintiff is the sum of \$7500'. This is a case in which the amount is not involved. It is either for \$7500 or nothing.

The other form is 'We, the Jury in the above entitled cause, find for the defendant'. After all of you have concurred upon a verdict unanimously, you

will [227] have the same signed by your foreman who will return it into court in the presence of the entire jury.

Members of the Jury: under the rules of this court it is possible for either counsel to present suggestions about the instructions. These must be presented prior to the time you retire to consider your verdict. Now, they are presented in the absence of the jury so you may now retire but not to consider of your verdict until after Counsel has offered their suggestions.

Whereupon, the jury having retired from the Court room, the following proceedings were had:

Mr. Mack: The case having ended, and the Court having instructed the jury and the jury having not yet retired the defendant excepts to the instruction of the Court with reference to the testimony of Thomas Heatfield, in which the Court permits the jury to determine whether or not his testimony was admissible because he is talking about the same place as Mr. and Mrs. Harrington placed the car. The evidence on the part of Mr. Heatfield definitely shows, first, that the person, Mr. Abraham, from whom he had obtained his location of the car was not at the place where Mr. Harrington was, which is definitely stated in his testimony.

Judge Schwellenbach: The exception is considered and allowed.

Mr. Mack: Additionally there is no testimony of any kind whatsoever to connect the place where Mr. [228] Harrington was, or where Mr. Harrington

ton stated he took pictures with any of the places referred to by Mr. Harrington.

Judge Schwellenbach: Exception considered and allowed.

Mr. Mack: The defendant further excepts to submitting to the jury any question whatsoever with reference to the accident by reason of the defendant's contention it was not accidental. I am not saying the instruction was in error, I merely say——

Judge Schwellenbach: The exception is considered and allowed.

Mr. Mack: That is all.

Judge Schwellenbach: Swear the bailiffs.

Whereupon the jury was returned to the courtroom, and the bailiffs sworn to take charge of same.

Judge Schwellenbach: You may now retire to consider of your verdict. [229]

State of Washington,
County of Spokane—ss.

I, J. J. Cole, Do Hereby Certify that I am the Court Reporter who reported in shorthand the matters and proceedings occurring in the trial of the above entitled cause; that the above and foregoing Statement of Facts is an accurate transcription of the same.

J. J. COLE,
Court Reporter.

[Endorsed]: Filed July 28, 1943. [230]

CLERK'S NOTE:

Plaintiff's Exhibit C, same as Exhibit A to complaint at page 8 of this printed transcript.

Plaintiff's Exhibit D, same as Exhibit B to complaint at page 9 of this printed transcript.

Plaintiff's Exhibit E, same as Exhibit C to complaint at page 11 of this printed transcript. [231]

PLAINTIFF'S EXHIBIT NO. "F"

Deaconess Hospital—Spokane, Washington
Department of Pathology
Record of Necropsy A-68-42

#316

Heatfield, Augustus S.—Age 65 years 9 months
Died: 6-30-42 at 11:45 A. M. near Orient, in Ferry County, Washington Necropsy by Drs. George A. C. Snyder and Joseph B. Finney at Smith Funeral Home, Spokane, Washington at 3:00 p. m. on 7-10-42. Drs. Peter Reid, David H. Lewis, James E. Cunningham, R. G. Boyd, Mr. Harry M. Morey and Mr. F. L. Zappone present.

Anatomic-Pathologic Diagnoses

Acute dilatation of right cardiac chambers;

Acute pulmonary edema;

Periaortic hemorrhage involving upper descending aorta;

Atherosclerosis of aorta and of coronary arteries with atheromatous stenosis of left coronary artery;

Mild pulmonary emphysema;

Multiple petechial hemorrhages of thymic remnants;

Atherosclerosis of cerebral arteries;

Focal cystic encephalomalacia, right globus pallidus;

Mild benign fibroadenomatous hyperplasia of prostate gland;

Diverticulosis of sigmoid colon;

Lymphangiogenic cysts of spleen;

Focal epicardial thickening (so-called "soldier's spot");

Anomalous fissure of upper lobe of right lung;

Alopecia;

Anthraxis of lungs and tracheobronchial lymph nodes;

Multiple postmortem changes and embalming artefacts.

The arterially embalmed body is that of a well developed, well nourished white man past middle age. Body heat and rigor mortis are absent. The face is covered by a heavy layer of embalmer's cosmetic. The scalp hair is absent over the vortex. The eyes and the mouth are closed by the embalmer, and are not examined. There is no evidence of disease or injury visible about the head or the neck. The chest is symmetrical. On the skin of the chest are several flat non-pigmented nevoid lesions. The [232] abdomen is flat. In the abdomen is a post-mortem trocar wound made by the embalmer. The external genitalia show no changes. The extremities contain needle wounds made by the embalmer and there is irregularly

scattered crepitus of the subcutaneous tissues. The fingers and toes show marked dessication and are mummified. Postmortem lividity is not evident and there are no evident changes about the back of the body.

The subcutaneous fat in the usual incision of the trunk in front is moist, yellow and about 1.5 cms thick at the level of the umbilicus. The skeletal musculature is fairly well developed. The subcutaneous tissues show irregular postmortem embalming fixation. The abdominal cavity contains turbid fluid having a strong odor of formaldehyde and the viscera are riddled by postmortem trocar punctures made by the embalmer. The peritoneum is smooth and glistening. The abdominal viscera are normal as to size, position, number and configuration. The mucosa of the urinary bladder shows no changes. In the prostate gland are some small spongy nodules which slightly enlarge its lateral lobes. The mucosa of the rectum and the seminal vesicles show no changes.

The ribs cut readily, revealing an abundance of red bone marrow. The lungs lie free; the thoracic viscera are riddled by postmortem trocar punctures made by the embalmer. The pleural cavities contain a little turbid fluid having a strong odor of formaldehyde. The thymus is largely replaced by fat and in it are some tiny hemorrhages. The pericardia are smooth and shiny. Over the anterior surface of the right ventricle the epicardium shows a small oval area of milky thickening. The

space occupied by the heart is somewhat increased.

When the viscera are turned downward, no changes are seen in the posterior thoracic or abdominal walls. The intima of the descending aorta is mottled by a few atheromatous plaques and shows some hemolysis staining. There is slight hemorrhage, apparently between the media and the adventitia of the upper portion of the descending aorta; this hemorrhage involves chiefly the posterior aortic wall. The aortic intima in the region of this hemorrhagic area is intact however, and no point of origin for aneurysmal dissecting hemorrhage is found. The mucosa of the trachea and of the main bronchi is slightly hypermic. The tracheobronchial lymph nodes are pigmented grayish to black, but are otherwise unchanged. The pulmonary [233] arteries and veins, and the superior and inferior venae cavae show no changes. The right lung is air-containing throughout. Its pleural surface is smooth and is streaked and mottled grayish to black. There is partial division of its upper lobe into an upper and lower division by a shallow sulcus in it, but this division of the lobe is incomplete; the anomalous sulcus has an horizontal direction. The surfaces made by sectioning the right lung are dry, irregularly reddish, and in many of the pulmonary vessels are clots having the shiny homogeneous appearance typical of postmortem clots. The bronchi show no changes. In some areas the lung parenchyma is slightly emphysematous. The lung parenchyma shows some grayish to black streaking and mottling. The lobes

of the left lung have the usual form and number and its parenchyma resembles that of the right one. The heart weighs 370 gms. The right chambers are dilated, and there is some flattening of the papillary muscles and trabeculae carneae. The tricuspid and pulmonic valves show no changes. The left cardiac chambers show no changes. The leaflets of the mitral and of the aortic valve show slight atheromatous mottling but are flexible and otherwise unchanged. The left ventricular myocardium is of normal thickness but that of the right ventricle is thin and in places does not exceed 3 mms in thickness. The septal myocardium shows no changes. A few atheromatous plaques are present in the ascending aorta, which is otherwise unchanged. The ostia of the coronary arteries are freely patent. Serial sectioning of the coronary arteries reveals eccentric atheromatous thickening of their walls, but in the right coronary artery this produces no appreciable narrowing of the lumen and this vessel is freely patent throughout. The left coronary artery shows narrowing of its lumen by this atheromatous involvement of its wall and in its main trunk and in the proximal centimeter or so of its anterior interventricular branch are some clots which have the homogeneous shiny appearance typical of post-mortem clots. The circumflex branch of the left coronary artery shows slight atheromatous mural thickening, but is not appreciably narrowed and is freely patent throughout. The cardiac foramen ovale is closed. The heart is riddled by trocar

punctures. The adrenal glands show no changes. The kidneys are normal in size and position. Their capsules strip readily, revealing smooth cortical surfaces. They cut readily, revealing no changes other than irregular embalming fixation of [234] their parenchyma. The renal pelves and the ureters show no significant changes. The gall bladder, the extrahepatic bile ducts, the portal vein and its larger tributaries are unchanged excepting that in the distal portion of the splenic vein is a clot having the shiny homogeneous red appearance typical of a postmortem clot. Serial sectioning of the pancreas reveals no changes in it. The spleen is of average size. Its capsule is smooth. It cuts readily, revealing a firm reddish-gray pulp on a level with its stroma. The lymph follicles are plainly visible. In the spleen just beneath its capsule are some small homogeneous whitish glossy areas. The liver capsule is smooth and transparent. It cuts readily, revealing a parenchyma which shows no changes other than irregular embalming fixation. No changes are found in the esophagus, in the stomach, the duodenum or in the rest of the small bowel. The stomach contains a few macerated raisins. The colon shows no changes excepting that in its sigmoid portions are some small diverticula containing fecal material. No evidence of inflammatory reaction is seen about these.

When the tissues of the scalp are dissected back, no changes are found in them. The calvarium is

unchanged. Then the dura is reflected, there is seen minimal atrophy of the frontal lobes of the brain. The leptomeninges are unchanged. The base of the brain and the cranial nerves are unchanged. There is slight irregular thickening of the vessels forming the *circulus arteriosus* but these are all patent throughout. Serial horizontal sectioning of the brain reveals no gross changes in it excepting a small cystic area in the right *globus pallidus*. The brain tissue, especially that of the cerebellum, pons and medulla is poorly fixed by embalming and the brain has a decomposed odor. The base of the skull shows no evidence of recent or of old fracture. No changes are found in the internal or middle ears, in the sphenoid or posterior ethmoid sinuses or in the hypophysis.

The spinal cord and the neck organs are not examined.

Microscopic Examination

Aorta: There is slight intimal thickening and hyaline change but the media shows no changes. In the adventitia there is considerable fresh hemorrhage.

Kidneys: Some of the larger arteries show slight intimal thickening. A few obliterated and hyalinized glomeruli are present but these are not [235] in excess of the number to be expected in an individual of this age. There is marked alteration of staining of the tubular epithelial cells; this is probably a postmortem phenomenon.

Myocardium: Sections from the left ventricle show slight hypertrophy of some of the muscle

cells with areas of replacement of muscle cells by patches of fibrous connective tissue. There is marked narrowing of some of the intramural branches of the coronary arteries by intimal fibrosis and hyaline change. Sections from the right ventricle show slight hypertrophy of a few of the muscle cells and separation of muscle bundles by fat.

Spleen: The sinuses are distended by blood and some of the reticuloendothelial cells contain granular brownish pigment having the characteristics of old hemic pigment. Some of the veins contain typical postmortem clots. The lymph follicles show no changes. In some sections there are subcapsular spaces lined by flattened endothelioid cells and filled by albuminous material.

Hypophysis: The sections show no significant changes.

Adrenal glands: There is focal infiltration of capsules and of the cortex, especially of the zona glomerulosa, by lymphocytes and a few histiocytes. Similar infiltrates are seen also in the medulla and about the central adrenal veins.

Lungs: There is dilatation of some alveoli and many alveoli contain albuminous material which is mixed with blood in some alveoli. The vessels are engorged and in many of them are typical postmortem clots. A small amount of black pigment is deposited in the peribronchial tissues in the usual manner. Some of the bronchi contain albuminous material and blood.

Liver: Excepting for alterations of nuclear staining which are probably postmortem in nature and for some brownish pigmentation of hepatic cells about the central veins, no changes are seen in the sections.

Left coronary artery: There is marked intimal thickening by fibrosis and hyaline change with some calcareous infiltration and narrowing of the lumen by this process. In the lumen is some post-mortem blood clot.

Thymus: A considerable amount of thymic tissue remains, but this does not appear to be hyperplastic. There is engorgement of blood vessels with multiple fresh hemorrhages in the thymic tissue and in the fat.

Right globus pallidus: There is a cystic area of old softening with a few scavenger cells in the cyst walls. The blood vessels in the [236] neighborhood of the cyst show no significant changes.

Prostate gland: There is some increase in the prostatic stroma which is irregularly infiltrated by lymphocytes and a few plasma cells. The glandular tissue is slightly increased and the scini are lined by well differentiated epithelial cells.

Pancreas: The only change is marked post-mortem autolysis.

GEORGE A. C. SNYDER, M. D.
Pathologist [237]

[Title of Court and Cause—U. S. District Court]

DEFENDANT'S REQUESTED
INSTRUCTIONS

Comes now the defendant and requests the Court to instruct the Jury as follows, by giving Instructions I and II attached.

M. E. MACK

Attorney for Defendant

832 Old National Bank

Bldg.

Spokane, Washington.

Service accepted and copy received this 16 day
of April 1943

HARRY M. MOREY

Atty for Plaintiff

[Title of Court and Cause—U. S. District Court]

DEFENDANT'S REQUESTED
INSTRUCTIONS

I.

The jury is instructed: That before you can give any consideration to the expert testimony admitted in this case, you must find, under the evidence admitted or reasonable inference therefrom, that after the automobile which the deceased was driving had come to a stop in the ditch an accident did occur. There being no evidence admitted as to how this automobile had gotten into said ditch.

Moyer vs. Aetna Life Insurance Co., 126 Fed.
2nd 141.

II.

You are instructed:

That in your deliberations on the verdict in this case you must not, individually as jurors, or collectively as such, permit sympathy or good will, like or dislike for either party to this action, or passion or prejudice for either party to this action, to influence you individually or collectively, in arriving at a verdict in this case.

[Endorsed]: Filed—April 16, 1943

[Title of Court and Cause—U. S. District Court.]

VERDICT

We, the Jury in the Above Entitled Cause, find for the plaintiff in the sum of \$7500.00.

J. E. McGOVERN,
Foreman.

[Endorsed]: Filed—April 16, 1943 [238]

In the District Court of the United States
Eastern District of Washington

No. 316

EDNA L. HEATFIELD,

Plaintiff,

vs.

STANDARD ACCIDENT INSURANCE COM-
PANY OF DETROIT, MICHIGAN

Defendant

JUDGMENT

This cause came regularly on for trial at the call of the calendar on Wednesday, April 14, 1943, the plaintiff appearing in person and by her attorney, Harry M. Morey, and the defendant appearing by its attorney, M. E. Mack, and a Jury having been impanelled and sworn, the plaintiff introduced her evidence and rested. Whereupon the defendant introduced its evidence and rested, and the Court instructed the Jury, and the Jury, after hearing the arguments of counsel, retired to consider its verdict and later brought in a verdict in favor of the plaintiff to the effect that plaintiff have and recover of the defendant the sum of Seventy-five Hundred Dollars (\$7500.00).

Now, Therefore, it is hereby Ordered, Adjudged and Decreed, that the plaintiff, Edna L. Heatfield, do have and recover of and from the defendant, Standard Accident Insurance Company of Detroit, Michigan, the sum of Seventy-five Hundred Dol-

lars (\$7500.00), together with interest thereon at the rate of six per cent (6%) per annum from the date of the judgment, together with plaintiff's costs and disbursements herein incurred to be taxed by the Clerk in the sum of \$285.97.

Approved, Clerk is directed to enter.

Done in Open Court this 19 day of April, 1943.

L. B. SCHWELLENBACH,
Judge

Presented by

HARRY M. MOREY

Attorney for Plaintiff.

O. K. as to form.

M. E. MACK

Attorney for Defendant.

[Endorsed]: Filed—April 19, 1943 [239]

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND DISBURSEMENTS

DISBURSEMENTS

	Amount Claimed	Amount Allowed
Clerk's Fees—Filing fee and judgment fee....\$	12.00	\$.....
Marshal's Fees—Service on Insurance Com- missioner	2.27	.....
Attorney's Fees—Statutory	20.00	.....
Commissioner's Fees .....	.....	.....
Master in Chancery's Fees .....	.....	.....
Reporter's Fees	15.00	.....
Miscellaneous Costs—One-half lunch for Jurors	7.10	.....

Atty. fee for taking deposition Heatfield and Selbach	5.00	.....
Notary Fee deposition Tom A. Heatfield.....	21.10	.....
Notary Fee deposition W. T. Selbach	7.50	.....
Witness Fees .....		.....
(Give name, address, number of days of attendance, and mileage)		
Tom A. Heatfield, Richmond, Cal.	2.00	.....
W. T. Selbach, San Francisco, Cal.....	2.00	.....
Ralph Harrington, North of Curley, Wn.		
(340 Miles) 1 day	54.00	.....
Mrs. Ralph Harrington, North of Curlew, Wn.		
(340 Miles) 1 day	54.00	.....
Tom Callan, Boyds, Wn. (200 miles) 1 day....	33.00	.....
Lewis Murphy, Republic, Wn. (280 Miles)		
1 day	45.00	.....
Dr. W. N. Myhre, Spokane, Wn., 1 day.....	3.00	.....
Dr. Geo. A. C. Snyder, Spokane, Wn. 1 day	3.00	.....
Total.....	\$285.97	\$285.97

Taxed 4/29, 1943

A. A. LaFRAMBOISE,
Clerk

United State of America

Eastern District of Washington—ss:

Harry M. Morey, being duly sworn, deposes and says: That he is the Attorney for the Plaintiff in the above-entitled cause; and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause and that the services charged herein have been actually and necessarily performed as herein stated.

HARRY M. MOREY

Subscribed and sworn to before me, this 26th day of April, 1943

(Seal)

PHILIP S. BROOKE

Notary Public

To Standard Accident Insurance Company of Detroit, Michigan and to M. E. Mack, Your Attorney:

You will please take notice that on Thursday, the 29th day of April, 1943, at the hour of 9:30 o'clock A. M., application will be made to the Clerk of said Court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said Court, in such case made and provided.

HARRY M. MOREY

Attorney for Plaintiff

Due service of the within and foregoing Memorandum of Costs and Disbursements and notice of the taxation thereof by the receipt of a true copy thereof, hereby admitted in behalf of all parties entitled to such service by the Rules of Court, this April 26, 1943

M. E. MACK

Attorney for Defendant

[Endorsed]: Filed—April 29, 1943 [240]

[Title of Court and Cause—U. S. District Court]

MOTION TO SET ASIDE VERDICT AND
JUDGMENT ENTERED THEREON AND
TO ENTER JUDGMENT IN ACCORD-
ANCE WITH DEFENDANT'S MOTION
FOR DIRECTED VERDICT

Comes now the above named defendant and moves the Court to set aside the verdict of the jury rendered herein and the judgment entered thereon and to enter judgment for the defendant notwithstanding said verdict in accordance with its motion for a directed verdict.

This motion is based upon the records and files herein and upon the following grounds:

I.

That said verdict for the plaintiff is contrary to law.

II.

That said verdict for the plaintiff is contrary to the evidence and that is no evidence or reasonable inference from the evidence to justify the verdict.

III.

That said verdict is contrary to the law and the evidence.

IV.

That the court erred in refusing to direct a verdict for the defendant in accordance with defend-

ant's motion for a directed verdict made at the close of all of the evidence.

M. E. MACK

Attorney for Defendant,
832 Old National Bank Building,
Spokane, Washington.

Service accepted and copy received this 23 day of April, 1943.

HARRY M. MOREY

Attorney for Plaintiff

[Endorsed]: Filed April 24, 1943. [241]

[Title of Court and Cause—U. S. District Court]

MOTION FOR NEW TRIAL

In the event that the motion of defendant to set aside the verdict and the judgment entered thereon in favor of the plaintiff and to enter judgment notwithstanding said verdict for the defendant in accordance with its motion for directed verdict, is denied, but not otherwise, defendant herein moves the court for an order granting it a new trial for the following causes and upon the following grounds materially affecting the substantial rights of the defendant.

I.

That there is no evidence or reasonable inference from the evidence to justify the verdict in favor of the plaintiff, and that the verdict for plaintiff is contrary to law.

II.

Error in law occurring at the trial and excepted to at the time by the defendant in permitting Tom Heatfield to testify with reference to his *claim* location of the deceased's automobile and the conditions surrounding the same, when his evidence definitely established.

a. That he, prior to the 3rd day of July, 1942, had never been to the place where deceased's automobile was in the ditch.

b. That he only received his instructions as to locality from one Dan Abraham who also had never been to the place, as shown by the testimony of the said Heatfield.

c. That instructions so given him did not select any substantial object or any reasonable method of locating the same, his informant stating that it was about eleven miles from Curlew, Washington.

d. That there is additionally no showing that Dan Abraham knew where the place was. The only persons that knew were Ralph Harrington and his wife, and that any information obtained from Mr. Abraham was hearsay and guess work and what someone else, if anyone, told Mr. Abraham.

III.

Error in law occurring at the trial and excepted to at the time by the defendant in that court instruct the jury.

a. That notice as provided by the policy was given. [242]

IV.

Error in law occurring at the trial and excepted to at the time by the defendant in the admission of the testimony of Mrs. Ralph Harrington with reference to statements of the deceased, said statements being hearsay, self-serving declarations and not a part of the Res Gesta.

V.

Error in law occurring at the trial and excepted to at the time by the defendant in the admission of the testimony of Tom A. Callam in which he was permitted to testify that the deceased said at least three hours after any occurrence and after he had been lying down for at least an hour, and after he had been pulled out of the ditch and after he had driven to the forest camp, the foregoing statement. That the same is not a statement of a fact but a conclusion of the deceased, hearsay, self-serving declaration and not a part of the Res Gestae, said statement being, deceased said he over-exerted himself.

VI.

Error in law occurring at the trial and excepted to at the time by the defendant in that the court instructed the jury that they could find from the evidence and reasonable inferences herefrom that an occurrence had occurred and that the deceased could have died from accidental means.

VII.

Error in law occurring at the trial and excepted to at the time by the defendant in that the court

permitted the testimony of Dr. Myra and Dr. E. C. Snyder when there was no evidence upon which it could be based.

M. E. MACK

Attorney for Defendant.

832 Old National Bank Building,
Spokane, Washington

Service accepted and copy received this 23 day of
April, 1943.

HARRY M. MOREY

Attorney for Plaintiff

[Endorsed]: Filed—April 24, 1943 [243]

[Title of Court and Cause—U. S. District Court]

MOTION FOR RE-HEARING

Comes Now the Defendant in the above action, and through their Counsel, M. E. Mack, moves the Court to re-hear the Motion for Judgment, setting aside the verdict, and granting judgment in favor of the Defendant, on the record made in the child of this action and a new trial, and shows the Court that at the time of the hearing on said Motions, April 30th, 1943, at 10 o'clock A. M., after Defendant's Counsel had read the transcribed testimony of witness, Floy Harrington, this Court, your Honor, said to Defendant's Counsel, immediately after said testimony had been read: "What you are trying to do is to say that I, meaning your Honor, is bound by the testimony given by her on cross examination." And that

is exactly what Counsel for the defendant unqualifiedly believes the law is and was. She being the only witness produced by the Plaintiff, the Plaintiff was and is bound by a statement made on cross examination which contradicts testimony given in the direct examination, or explains it, or establishes that the testimony given on direct examination was not as established by a combination of both the direct and cross examination.

Paragraph two of the Motion for a New Trial was not at the time, the Court ruled, argued whatsoever, and it was the Counsel's positive intention to call the Court's attention to the error claimed in said paragraph two.

That the error claimed in paragraph five of the Motion for a New Trial was error as contended at the trial and now in the admission of the testimony of Thomas A. Callan, and it was not argued at the time of the aforesaid hearing. And the same is true as to grounds in six and seven of said Motion for a New Trial, as set out in the defendant's Motion.

Supporting authority: 81 L Ed. 557 at 561 Wayne U. S. Gas Co. vs. Owens Illinois Gas Co. 300 U S 131-1-38.

M. E. MACK

Attorney for the Defendant
832 Old Nat'l Bank Bldg.

Service accepted this 6th day of May, 1943.

HARRY M. MOREY

Attorney for the Plaintiff

[Endorsed]: Filed—May 6, 1943. [244]

[Title of Court and Cause—U. S. District Court]

ORDER DENYING MOTION TO SET ASIDE
VERDICT AND JUDGMENT

This matter coming on regularly for hearing by the Court on April 30, 1943, on defendant's Motion to Set Aside Verdict and Judgment Entered Thereon, and to enter Judgment in Accordance with Defendant's Motion for Directed verdict, and after hearing said Motion and the argument of counsel, and the Court being fully advised in the premises it is by the Court

Ordered, that said Motion to Set Aside Verdict and Judgment Entered Thereon and to enter Judgment in Accordance with Defendant's Motion for Directed Verdict is hereby denied.

Done in open court this 11 day of May, 1943.

L. B. SCHWELLENBACH,
Judge.

Presented by:

HARRY M. MOREY,
Attorney for Plaintiff.

Approved as to form

M. E. MACK,
Attorney for Defendant.

[Endorsed]: Filed—May 11, 1943

[Title of Court and Cause—U. S. District Court]

ORDER DENYING MOTION FOR NEW
TRIAL

This matter coming on regularly for hearing by the Court on April 30, 1943, on defendant's Motion for a New Trial, and, after hearing said Motion and the argument of counsel, and the Court being fully advised in the premises, it is by the Court

Ordered, that said Motion for a New Trial is hereby denied.

Done in open court this 11 day of May, 1943.

L. B. SCHWELLENBACH,
Judge

Presented by:

HARRY M. MOREY,
Attorney for Plaintiff.

Approved as to form

M. E. MACK
Attorney for Defendant

[Endorsed]: Filed May 11, 1943 [245]

[Title of Court and Cause—U. S. District Court]

ORDER

Now, to-wit: on this 25th day of May, 1943, this matter coming regularly on for hearing on the motion of the defendant for a re-hearing of his motions filed in this Court for an order setting aside the verdict of the Jury, and judgment thereon, and

to render judgment for the defendant, and in the event said motion be denied, for the granting of a motion for a new trial; M. E. Mack, appearing for the defendant, and Harry Morey, appearing for the plaintiff, and the Court being duly advised of said motion for re-hearing thereof of said motions, and being duly advised in the premises:

It Is Therefore Ordered, Adjudged and Decreed that the said Motion for Re-hearing be and the same is hereby denied.

L. B. SCHWELLENBACH,
Judge

M. E. Mack

[Endorsed]: Filed May 25, 1943

[Title of Court and Cause—U. S. District Court]

NOTICE OF APPEAL

Notice is hereby given that the Standard Accident Insurance Company of Detroit, Michigan, a corporation, defendant above named, hereby appeals to the Circuit Court of Appeals, for the Ninth Circuit, from the final judgment entered in this action. Judgment on the verdict of the Jury was entered on the 19th day of April, 1943, and Order denying defendant's Motion to set aside the verdict and enter judgment thereon, and to enter judgment in accordance with defendant's motion for a directed verdict was entered on the 11th day of May, 1943, and an order denying defendant's alternative mo-

tion for a new trial or for judgment notwithstanding the verdict of the Jury, was entered on the 11th day of May, 1943.

M. E. MACK

Attorney for Defendant

Address: 832 Old National
Bank Building, Spokane,
Washington

Service accepted by receipt of copy on this
day of July, 1943

.....

Attorney for Plaintiff

Copy of the above notice of appeal mailed to
Harry M. Morey, Attorney for the Plaintiff, July
10, 1943

EVA M. HARDIN

Deputy Clerk

[Endorsed]: Filed July 10, 1943 [246]

—

[Title of Court and Cause—U. S. District Court]

SUPERSEDEAS AND APPEAL BOND

Know All Men By These Presents That we, The
Standard Accident Insurance Company of Detroit,
Michigan, a corporation, defendant above named,
as Principal, and Fidelity & Deposit Company of
Maryland, a corporation organized under the laws
of the State of Maryland, and authorized to trans-
act the business of surety in the State of Washing-
ton, as Surety, are held and firmly bound unto

Edna L. Heatfield, complainant above named, in the just and full sum of \$8500.00, for which sum well and truly to be paid, we bind ourselves and our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of July, 1943.

The condition of this obligation is such that, whereas, the above named complainant on the 11th day of May, 1943 in the above entitled action and court recovered judgment against the above named defendant for the sum of \$7500.00, together with costs; and

Whereas, the above named principal is about to give notice that it appeals from said judgment of the above entitled court to the United States Circuit Court of Appeals, for the Ninth Circuit;

Now, Therefore, if said principal Standard Accident Insurance Company shall pay to Edna L. Heatfield, complainant above named, all costs that may be awarded against it if said appeal is dismissed, or the judgment affirmed, or such costs as said appellate court may award if the judgment is modified, and further if said principal Standard Accident Insurance Company shall satisfy said judgment in full together with costs, interest and damages for delay if for any reason the said appeal is dismissed, or if the judgment is affirmed, and shall satisfy in full such modification of judgment and such costs, interest and damages as the appellate court may ad-

judge and award, then this obligation to be void; otherwise to remain in full force and effect.

STANDARD ACCIDENT IN-
SURANCE COMPANY

By M. E. MACK,

Its Attorney

(Seal)

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND

A. B. KALIN,

Attorney in Fact

Approved this 12 day of July, 1943.

L. B. SCHWELLENBACH

United States District Judge

[Endorsed]: Filed—July 12, 1943 [247]

[Title of Court and Cause—U. S. District Court]

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON APPEAL

Comes now the appellant, The Standard Accident Insurance Company of Detroit, Michigan, a corporation, by its attorney, M. E. Mack, and makes the following statement of the points on which it intends to rely on appeal:

I.

The trial Court erred in denying the defendant's (appellant's) motion for non-suit and for dismissal at the close of plaintiff's evidence, and in denying defendant's motion for a directed verdict at the close of all the evidence, and in submitting the case to the

jury, and in denying defendant's motion to set aside the *the* verdict and judgment for plaintiff and enter judgment for the defendant, and in denying the defendant's motion for a new trial and for judgment notwithstanding the verdict of the Jury, and to set aside the judgment for the plaintiff upon the following grounds:

(a) As a matter of law, there was no proof whatsoever of the death of Augustus S. Heatfield by accidental death or bodily injury affected directly, exclusively and independently of all other causes through accidental means.

(b) That there was no competent evidence whatsoever of any witness, establishing the death or bodily injury affected directly, exclusively and independently of all other causes through accidental means of Augustus S. Heatfield.

(c) That the policy upon which this action was based provides in:

Paragraph D-4 "Written notice of injury on which claim may be based must be given to the Company (defendant) within 20 days after the date of the accident causing such injury."

Paragraph E-5 "And such notice on behalf of insured or beneficiary may be given to the Company at Detroit, Michigan, or to any authorized agent of the Company, with particulars sufficient to identify the insured. Failure to give notice within the time provided in this policy shall not invalidate any claim, if it shall be shown not to have been reasonably possible to

give such notice, and that notice was given as soon as was reasonably possible.”

That no notice was given within the said 20 days whatsoever, and no waiver of such notice was plead.

[248]

The policy further provides:

Paragraph “S”—“Full compliance of the insured and beneficiary with all provisions of this policy is a condition precedent to recover hereunder (thereunder) and any failure in this respect shall forfeit to the Company (defendant) all right to any indemnity.”

II.

The Court erred in denying defendant's (appellant's) alternate motion for a new trial based upon the matters set forth in Point I, and in admitting the testimony of Floy Harrington and Thomas A. Callam, and overruling the defendant's (appellant's) objection, as their testimony was incompatible, immaterial and irrelevant; self-serving, and not a part of the *res gestae*. Their testimonies both being narrations and not spontaneous and occurring approximately 2 hours after whatever did happen occurred, and there being no proof of any disability whatsoever on the part of the said Augustus S. Heatfield to prevent his having done so any time during said 2 hours, and having had ample time to reflect,—he being an insurance agent.

III.

The Court erred in denying defendant's (appel-

lant's) alternative motion for a new trial in admitting the testimony of the son, Thomas A. Heatfield, as to the locality and the conditions surrounding it, of the place of the alleged occurrence; he not having been there until 3 days after whatever happened did occur, no one that ever was there directing him to the place, and his only informant being a party who had never been to the place.

IV.

The Court erred in denying the defendant's (appellant's) motion for a new trial because of its admitting in evidence, Exhibit No. 1 being the first notice given to the defendant (appellant) 30 days after the injury upon which this action is based, and holding that the same was sufficient, and there being no plea or proof of waiver whatsoever.

V.

The Court erred in denying defendant's (appellant's) alternate motion for a new trial, instructing the jury that due notice in accordance with paragraphs D-4 and E-5 was given, when there was positively no proof to sustain the court whatsoever,—no such notice ever being given until [249] long after the expiration of the time limits in the policy, and no waiver having been plead whatsoever.

VI.

The Court erred in denying defendant's (appellant's) motion for a new trial in admitting testimony of Drs. Myra and E. C. Snyder. There be-

ing no evidence upon which it could be legally based.

VII.

The Court erred in denying the defendant's (appellant's) motion to dismiss the action based on the allegations in the complaint. They being insufficient to establish the death of Augustus S. Heatfield.

VIII.

The Court erred in instructing the jury that the question of notice of accidental injury was withdrawn from their consideration, in other words, that the letter of July 8th, 1942, was sufficient notice to the Defendant.

M. E. MACK,

Attorney for Defendant.

Service accepted by receipt of copy this 17th day of July, 1943.

HARRY M. MOREY,

Attorney for Plaintiff.

[Endorsed]: Filed July 17, 1943. [250]

[Title of Court and Cause—U. S. District Court.]

STIPULATION

Come now the parties above named, plaintiff, Edna L. Heatfield, by her attorney, Harry M. Morey, and defendant, The Standard Accident Insurance Company of Detroit, a corporation, by its attorney, M. E. Mack, and hereby agrees and stipu-

late that the following parts of the record, proceedings and evidence shall be and are designated to be included in the record on appeal, to-wit:

1. Certified transcript of transfer of case to thos Court, containing Complaint.

2. Notice of filing said transcript.

3. Order denying Motion to Dismiss—Said Motion being a part of said transcript.

4. Order denying Motion to Strike—Said Motion being a part of said transcript.

5. Order on Motion to make more definite and certain. Said motion being a part of said transcript.

6. Bill of Particulars.

7. Answer.

8. Reply.

9. Interrogatories.

10. Answer to Interrogatories.

11. Demand for Jury.

12. Defendant's *request instructions*.

13. Verdict of the Jury.

14. Judgment.

15. Cost Bill.

16. Motion for New Trial.

17. Motion to Set Aside Verdict and for Judgment.

18. Motion for Re-Hearing.

19. Order denying Motion for New Trial.

20. Order denying Motion to Set Aside Verdict and for Judgment.

21. Order denying Motion for Re-hearing.

22. Notice of Appeal.

23. Supersedeas Bond on Appeal. [251]

24. Reporter's transcript of all testimony, evidence and proceedings at the trial, including rulings of the Court on the admission and exclusion of testimony, defendant's motion for non-suit and dismissal at the close of plaintiff's evidence, with the Court's ruling thereon, and defendant's motion for directed verdict at the close of all the evidence with the Court's ruling thereon, and the Court's instructions and defendant's objections to the Court's instructions, to be filed according to the rule.

25. All exhibits.

26. Statement of points relied on by appellant.

27. This Stipulation.

Dated at Spokane, Washington, this 17th day of July, 1943.

M. E. MACK

Attorney for Appellant

HARRY M. MOREY

Attorney for Appellee

[Endorsed]: Filed July 17, 1943. [252]

[Title of Court and Cause—U. S. District Court.)

APPLICATION FOR TRANSMISSION OF
ORIGINAL EXHIBITS TO THE CIRCUIT
COURT OF APPEALS

Comes now the plaintiff and defendant above named and moves the Court for an order providing for the safe keeping and transmission of all

the original exhibits to the Circuit Court of Appeals, for the Ninth Circuit, on the ground that said exhibits cannot conveniently or satisfactorily be copied into the record and should be inspected by the appellate court.

This motion is based on the files herein.

M. E. MACK

Attorney for Defendant-
Appellant

HARRY M. MOREY

Attorney for Plaintiff-
Appellee

[Endorsed]: Filed July 17, 1943.

[Title of Court and Cause—U. S. District Court.]

ORDER FOR TRANSMISSION OF ORIGINAL
EXHIBITS TO THE CIRCUIT COURT OF
APPEALS

This matter coming regularly on for hearing upon the motion of the plaintiff and defendant for an order to transmit all original exhibits to the Circuit Court of Appeals, and it appearing to the court that said Exhibits cannot be conveniently or satisfactorily copied into the record and that the same should be inspected by the appellate court;

Now, therefore it is ordered that the Clerk of this Court transmit all the original Exhibits to the Clerk of the Circuit Court of Appeals, for the

Ninth Circuit, as and when he transmits the transcript of the record on appeal herein.

Done this 17 day of July, 1943.

L. B. SCHWELLENBACH,
Judge

M. E. MACK OK

Attorney for Appellant

HARRY M. MOREY

Attorney for Appellee

[Endorsed]: Filed July 17, 1943. [253]

CLERK'S CERTIFICATE OF TRANSCRIPT OF RECORD

United States of America

Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing typewritten pages numbered from 1 to 247 inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein in the United States Circuit Court of Appeals as called for by Stipulation of Counsel, as the same remain on file and of record in the Office of the Clerk of said District Court, and that the same constitutes the record on appeal of The Standard Accident Insurance Company of Detroit, Michigan, a corporation, from the final

judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California.

I further certify that in accordance with the Order of this Court, I transmit herewith the following original exhibits—Plaintiff's Exhibits A, G, H, I, J and K, all being pictures, and Plaintiff's Exhibit B, being Insurance Policy No. C.A.C.—97R 1387.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing record amount to the sum of \$42.75, and that the same has been paid in full by M. E. Mack, Attorney for the Appellant.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid District Court, this 7th day of August, 1943.

(Seal)

A. A. La FRAMBOISE

Clerk of the United States
District Court, Eastern Dis-
trict of Washington

[Endorsed]: No. 10517. United States Circuit Court of Appeals for the Ninth Circuit. The Standard Accident Insurance Company of Detroit, Michigan, a corporation, Appellant, vs. Edna L. Heatfield, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Filed August 10, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals of
San Francisco, Ninth Circuit

No. 10517

THE STANDARD ACCIDENT INSURANCE
COMPANY OF DETROIT, MICHIGAN, a
corporation,

Appellant,

vs.

EDNA L. HEATFIELD,

Respondent.

POINTS RELIED ON AND RECORD
TO BE PRINTED

To Clerk of the Above entitled Court—Paul P.
O'Brien

1.

You are hereby notified that the appellant above named hereby adopts as its points on appeal, The Statements of Points appearing in the transcript of the record, in the above Court which was filed by the appellant in the trial court.

2.

That the entire transcript in the above case on appeal received by the above Court from the clerk of the trial court be printed in its entirety.

M. E. MACK

Attorney for the Appellant
832 Old National Bank Bldg.
Spokane, Washington.

Service accepted by receipt of copy on this 16th day of August, 1943.

HARRY M. MOREY

Attorney for Respondent

[Endorsed]: Filed Aug. 18, 1943.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE STANDARD ACCIDENT INSURANCE
COMPANY, a corporation,

Appellant,

vs.

EDNA L. HEATFIELD, *Appellee.*

No. 10517

*Upon Appeal from the District Court of the United
States for the Eastern District of Washington,
Northern Division.*

HONORABLE L. B. SCHWELLENBACH,
United States District Judge

APPELLANT'S OPENING BRIEF

M. E. MACK,
Attorney for Appellant.

FILED

OCT 15 1943

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE STANDARD ACCIDENT INSURANCE
COMPANY, a corporation,

Appellant,

vs.

EDNA L. HEATFIELD, *Appellee.*

No. 10517

*Upon Appeal from the District Court of the United
States for the Eastern District of Washington,
Northern Division.*

HONORABLE L. B. SCHWELLENBACH,
United States District Judge

APPELLANT'S OPENING BRIEF

M. E. MACK,
Attorney for Appellant.

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STATEMENT AS TO JURISDICTION OF THE DISTRICT COURT:

The jurisdiction of the District Court rested upon diversity of citizenship, the plaintiff being a citizen of the State of Washington and the defendant a corporation under the laws of the State of Michigan with the amount in controversy exceeding the sum of \$3,000.00 all as alleged in Petition for Removal from the Superior Court to the Federal Court, paragraphs 2-3 (Record p. 19-20). Said Petition being granted without objection. Order of Removal (Record p. 22-23) as alleged in Paragraphs I, II, III and V of the complaint and admitted in I and II and the above Petition for Removal.

The statutory provision believed to sustain the jurisdiction of the trial court is Section 24 of the Judicial Code as amended. U. S. Code Ann., Title 28, Sec. 41, (1) (b).

OF THE CIRCUIT COURT OF APPEALS:

The jurisdiction of this court is rested on an appeal from the final decision of the District Court rendered in favor of the plaintiff after a jury trial. (Record p. 240.)

The statutory provision believed to sustain the jurisdiction of this court is Section 128 of the Judicial Code as amended. U. S. Code Ann., Title 28, Sec. 225 (a).

STATEMENT OF THE CASE

That the defendant, The Standard Accident Insurance Company of Detroit, Michigan, a foreign corporation issued to Augustus S. Heatfield a policy of accident insurance in the sum of \$7500.00 insuring him against loss from bodily injuries affected directly, exclusively and independently of all other cause through accidental means, subject to all conditions and limitations in said policy contained for loss of life as provided in said policy \$7500.00. Indemnity payable to beneficiary who was his wife, Edna L. Heatfield. (Tr. 2-3.)

That on June 30, 1942, insured was driving an automobile on a narrow mountain road. That he was in a ditch off the road at four o'clock p.m. That the insured undertook to get his automobile back on the road and in doing so overexerted himself and placed an unusual strain upon his heart. That he thereafter became violently ill and death resulted between eight p.m. and eight a.m. of the following morning and that it was exclusively and independently of all other causes and not intentionally self-inflicted. (Tr. 3-4.)

That the insurance policy provided that written notice of injury must be given to the company within twenty days after the date of accident or to an

authorized agent of the company with particulars sufficient to identify the insured. Failure to give the notice within the time shall not invalidate the claim if it shall be shown not to be reasonably possible to give such notice and that notice was given as soon as reasonably possible.

That Lamping & Company, a corporation of Seattle, Washington, was the defendant's authorized agent and that notice was given it of the death of said deceased and that claim would probably be made, that an autopsy was held of the deceased. That on July 30, 1942, the plaintiff furnished the defendant at Detroit, Michigan, with an unverified proof of loss.

On August 25, 1942, the plaintiff made a fully sworn proof of loss which was forwarded to Lamping & Company at Seattle, Washington. That the defendant has failed to pay the indemnity and more than sixty days have elapsed. That the plaintiff has done all things required by policy of insurance to be done and prays judgment for \$7500.00 with costs and disbursements. (Tr. 6-7.)

Attached to the complaint is Exhibits A, B and C. (Tr. 8-9-12.)

The defendant filed a motion to dismiss the main ground of which was that the complaint does not state

facts sufficient to constitute a case of action. (Tr. 13.)

The action was removed to the District Court of the United States, to the Eastern District of Washington and came on for hearing and trial in said court. (Tr. 14-24.)

The defendant's motion to dismiss was overruled. (Tr. 25.)

The defendant answered denying Paragraph 4 and 5 that the insured was driven off the road, that the insured undertook to get his automobile back on the road and in doing so, overexerted himself and placed an unusual strain on his heart, that he became violently ill and death resulted between eight p.m. and eight a.m. and that his death was approximately, exclusively and independently of all other causes by said overexertion and strain.

The defendant admitted the requirements of the policy in the complaint D4, E5 and G7. (Tr. 5.)

Further answering the defendant denies that the plaintiff has done all things which the insurance policy require to be done by her and as a complete affirmative defense alleged that the said policy contained the following provision S. Full compliance of the insured and beneficiary with all the provisions of this policy is a condition precedent to recovery

hereunder and any failure in this respect shall forfeit to the company all rights to any indemnity. That the plaintiff or any one in her behalf totally failed to comply with Paragraph D4 or E5 or either of them. (Tr. 31.)

That no notice was given within the twenty days or at all. Denied that the plaintiff came to his death by accidental death or bodily injury affected directly, exclusively and independently of all other causes and that no notice was given as provided by provision of the policy D4 or G7 or E5 within the twenty days, that there is no allegation in the plaintiff's complaint that the plaintiff came to his death through accidental means. That the plaintiff or any one in her behalf furnished to the defendant proof of loss within ninety days from June 30, 1942, as required by G7. (Tr. 32-33.)

The defendant prayed that the plaintiff's complaint be dismissed. The plaintiff replied admitting Paragraph of the policy S denying the allegations contained in Paragraph Two of the first affirmative defense admitting as to Paragraph Three that it is a policy payable in the event of accidental death or bodily injury affecting directly, exclusively and independently through all other means and further alleging that although the plaintiff knew on July 8, 1942, that the insured had an accident policy and

that an effort had been made to find the policy, it was not until August 11 that the policy was found and until that date the plaintiff did not know the requirements thereof and denies that there is no allegation in the complaint that the insured came to his death through accidental means. That he denies in the reply the third affirmative defense. (Tr. 34-36.)

The case came on for trial by a jury and it found for the plaintiff. Ralph Harrington called as a witness testified that as he came around a curve he saw a car, one wheel was clear off the shoulder of the road and back wheels, one was down over the shoulder and the other in the soft shoulder. The man there who was deceased, stepped out from behind his car to stop him. He looked tired, fagged out and seemed worried. He was alone. The car off the road was there to stay without help. I saw a shovel there in the back of the car. (Tr. 49-53, Cross-Examination.)

“I never saw him doing anything at all. When I got out I looked it over to see what shape it was in and took the rock out so it wouldn't tear the fender and running board out. I got close enough to talk to him. We were there probably twenty minutes. Oh, I don't know how the rock got there. The road was over sixteen feet wide. He couldn't get out without help; he had to be pulled out. It was a quarter past six. I attached my front bumper to his front bumper. I started my motor and he started his, and backed him out.

He guided his car and after I got him on the road, I went on. About two miles away was a forest camp. I looked over the situation, no man could ever get that automobile out.

Q. You looked at the ground and all you noticed was that particular rock in front?

A. Yes, and a big limb. It was a pole.

Q. That was also under the automobile?

A. Down by the wheel where it could have torn the fender off.

Q. Did you see him doing any digging?

A. No, that was done when I got there. (Tr. 53-65.)

Floy Harrington said we reached the place at 6:15. It was a hot day and he was hot and tired, really exhausted. He had his hands on his abdomen.

Q. Tell what he said?

A. Well, as I said, he was holding his hands sort of like this about the abdomen and he said, 'I have an awful pain. I have a pain in my heart; the first time in my life I ever had trouble with my heart.' He said it was so hot and he got tired and exhausted, he had to lie down. (Tr. 65-70.)

A. He said he had been there two hours. He said he lay down an hour.

A. And it was real hot.

Q. So that we understand each other—he said he had attempted to move the car forward and move it back?

A. Yes, he had started the motor up and tried to get it up on its own power.

Q. That is about all you recall that Mr. Heatfield did?

A. Yes, as to his condition and what he had been doing.

Q. If he was breathing pretty heavily, you would have seen it?

A. Oh yes, if he was panting, I would have noticed it." (Tr. 71-75.)

Plaintiff at this point offered in evidence the policy of insurance marked "Plaintiff's Exhibit B," which was admitted. (Tr. 76.)

"Mr. Morey: May the record show that the plaintiff's Exhibit C is the document marked Exhibit A in the interrogatories which will be subsequently introduced.

Mr. Mack: We object to this Exhibit C for the reason it totally fails to serve any purpose in the case whatever. It is incompetent, irrelevant and immaterial and proves no statement in the case whatsoever.

The Court: I don't care to hear further argument. The objection is overruled and the exhibit is admitted. As I understand it, Exhibit C is also the same as Exhibit A attached to the complaint?

Mr. Morey: Yes, Your Honor.

Mr. Mack: After Exhibit C was read in evidence, the defendant moved to strike Exhibit C for the reason urged to the introduction thereof.

The Court: Motion denied."

Plaintiff offered in evidence Exhibit D being the letter dated June 30, 1942, which is the original of

plaintiff's Exhibit B attached to the interrogatories and also Exhibit B attached to the complaint. He offered that in evidence.

“Mr. Mack: I object to that as incompetent, irrelevant and immaterial and sustains nothing in the complaint.

This is dated July 30; it is not sworn to. I am at a loss to understand it. He contends it is a notice of some kind. It is clearly too late for the ordinary notice. If he contends it is proof of loss, it does not comply with the requirements. It is just a statement in a letter dated July 30 and it could not in any event be proof of anything in this case. I do not know what its purpose is.

The Court: Objection overruled. It will be admitted.”

After the introduction of Exhibit D the defendant moved to strike it for the reason as a self-serving declaration. (Tr. 76-81.) Overruled.

Thomas A. Callam was sworn and testified for the plaintiff. He lives at Boyds, Washington, and he was working on June 30, 1942, at a forest camp between Curlew and Kettle Falls. “A gentleman came to our camp on June 30, 1942. He was sick and he tried to vomit.”

“Q. Did this man say anything to you about any work he had done down on the road?

Defendant: I object to this as irrelevant and immaterial, self-serving declaration, hearsay and

not a statement of fact and not a part of the Res Gestae.

The Court: Objection overruled.

A. Yes, he said he had overexerted himself.

Mr. Mack: I move to strike that as a conclusion of Mr. Heatfield and not a statement of fact.

The Court: Overruled. Motion denied.” (Tr. 109.)

Thomas Heatfield testified for the plaintiff as follows:

“His father was Augustus S. Heatfield and a representative of the Hanover Fire Insurance Company. His work consisted of supervising local agents. I saw him last January 19, 1942, and he seemed normal. He was 65 years of age, and the same date and same age when he died.

Q. Did you have an opportunity to observe along the road at about the spot where there were automobile tracks that went off the road?

Mr. Mack: To which I object as irrelevant, incompetent and immaterial unless it is shown that it has some connection with the case.

The Court: I will sustain the objection until such time as you can connect it up with the place. (Tr. 89.)

The Court: You are objecting to the introduction of this testimony?

Mr. Mack: Yes, sir.

The Court: I will overrule the objection. It is a question for the jury as to the effectiveness of this notice. They will be instructed with reference to it.

Mr. Mack: I object to that. It is simply the view of the witness and not a statement of fact.

The Court: Objection sustained. Let the records show the defendant objects to all of this testimony by Mr. Heatfield. Your general objection will go to all of this testimony and is admitted over your objection.

There were distinct marks there where a car had been in the ditch.

The Court: I will instruct the jury to disregard the last part in so far as the witness said where the car had regained the road. They are on the south side of the road.

Mr. Mack: I definitely object to that as incompetent, irrelevant and immaterial.

The Court: I sustain the objection.

Q. The tracks very definitely show they were deeply imbedded in the loose earth. (Tr. 112.)

There were two sets of tracks. One was leading off the shoulder, the second set overlapping these was leading back to the road. I took five photographs that show clearly the marks made in the loose earth.

Mr. Mack: I object to it as incompetent, irrelevant and immaterial, not properly identified, not showing where it was taken, without reference to any condition apparent in this case.

The Court: The photo exhibit G is admitted in evidence. That portion of the answer of the witness which reads: 'The car was taken back to the shoulder of the road,' will be stricken. Picture will show for itself."

Plaintiff offers in evidence Exhibit H.

"Mr. Mack: I make same objection as to exhibit G.

The Court: Objection overruled."

"The Court: It will be admitted subject to the same objections and the same ruling."

Plaintiff hands Witness Heatfield Exhibit D, marked J.

"Mr. Mack: To which I make the same objection as to H, I, and J.

The Court: The same ruling.

My father carried a shovel in the car."

Plaintiff now offers in evidence Exhibit K, to which defendant objects.

"The Court: Subject to the same ruling. It will be admitted. (Cross examination.)

I drove all the way from Orient to Curlew, 22 to 24 miles. I contacted Don Abrahams after I had gone approximately half way, and I knew approximately from what he said where the accident occurred. He wrote nothing down. I located the place in my mind. I never saw the road before. I had not located the place when I met Mr. Abrahams. He was going west toward Curlew and I had traveled half the distance. Mr. Abrahams never saw my father where he was in the ditch." (R. 177.)

Dr. W. N. Myhre testified for the plaintiff. No objection was made as to his qualifications.

"I attended the autopsy on the body of Mr. Heatfield in Spokane.

Q. Was there anything, Dr. Myhre, in that post-mortem examination which in any way by

itself indicated what had caused Mr. Heatfield to die?

A. Yes, I think there was.

Q. What would you say that was?

A. There was evidence of coronary arterosclerosis.

Q. I suggest first you use the medical or technical term, and then explain that to us.

Q. The heart muscle is called—

Q. In other words, the thing that brings on this stenosis is overexertion.

Mr. Mack: I object to that as calling for a conclusion.

The Court: The objection is overruled.

A. Exertion will not bring on coronary stenosis.

Q. I want you to explain to me—you used the words ‘coronary stenosis.’

A. Yes, sir.

Q. How did you use that in connection with this mio-cardial insufficiency?

A. Coronary stenosis is what you might term the normal aging process in the walls of any vessel—it’s the normal aging process of all body blood vessels—it occurs earlier in some people than in others. Coronary stenosis, as I used it in Mr. Heatfield’s case, was the narrowing of all blood vessels or, in particular, narrowing to such extent it was practically incapable of furnishing the nourishment to this heart muscle.

The Court: Q. You say stenosis is not brought on by exertion. What about the insufficiency?

A. The insufficiency is brought on by a demand which is greater than the nourishment from the stenotic vessel, or that the vessel will supply. The muscle then becomes insufficient when it is not supplied with enough gasoline to carry it up the hill; insufficient for the task placed upon it.” (R. 124-5.)

CROSS EXAMINATION.

By Mr. Mack.

“Q. Stenosis, as I understand it then, is the thing itself which causes the blood to flow less freely through the artery.

A. That is correct.

Q. That is not brought on by exertion.

A. It is not.

Q. The stenosis then, apparently, is merely the fact the sclerosis narrows the artery.

A. Stenosis is the same thing that happens in hot water pipes—there is a lime deposit—it doesn’t occur suddenly.

Q. When stenosis becomes complete—

A. Then we have coronary occlusion.

Q. Which is the stoppage of all blood.

A. That’s right.

Q. Supposing you don’t know how much work and labor the man had done, could you say whether or not he overexercised, overexerted himself—is it possible to tell from that?

A. To tell he had overexerted from what we found in the dead body?

Q. Yes.

A. I would say it would be very difficult to tell what caused the thing by looking at the autopsy.

Q. Then the answer would be: No, you couldn't tell. (R. 131.)

A. That's right."

Dr. George Snyder testified for the plaintiff, as follows, after qualifying, he said:

"Q. Did this coronary sclerosis, did that have anything to do with that man's death?

Mr. Heatfield had hardening of the arteries.

Q. Doctor, considering the fact that Mr. Heatfield was sixty-five years of age, that he was an office man, traveling salesman, and that he had this condition you have described you found in his body, and that he was not accustomed to hard manual labor, and that he did not know he had any heart trouble, and that man, on a date, June 30th, 1942, in the morning and afternoon was the same as he always had been, apparently in good physical condition to all intents and purposes, seemed to feel all right, about three o'clock that afternoon he seemed to be in that condition, about six o'clock he was found with his car off the road, a mountainous country road, isolated spot, car in such condition it can't be moved without being towed, this Mr. Heatfield was tired and said that he had been working on his car for about two hours, and worked so hard he had to lie down and rest, and had for the first time in his life heart pains about his heart; then, further assuming that that was about 6:15 and about 6:30 other witnesses saw him and he was vomiting, stooped over, and when this first witness saw him he was holding his hand down on the front part of his body, and the second witness, with a third witness,

helped put him on a bed that night, and while he was there he told this witness he had been working hard on his car, overstrained himself, overexerted himself, and he was found dead the next morning—do you have an opinion as to what caused his death? Answer that ‘yes’ or ‘no.’

Mr. Mack: I object to that as incompetent, irrelevant and immaterial, assuming facts not proven, not showing that the man was vomiting, no showing he had been working two hours—no statement he had overexerted himself, it’s not in accordance with the facts so far proven in this case.

The Court: Then I will overrule the objection.

Q. Now what, in your opinion, caused his death?

A. In my opinion, it was due to physiological disturbances of his heart, functional disturbances in the action of his heart.

Q. What caused that?

A. In the first place, this man had a narrowing of the coronary artery due to a hardening process. In a second place, there was a hemorrhage or bleeding about the upper end of the aorta and these things, this coronary artery narrowing and the hemorrhages around the upper end of the aorta *probably* resulted in a spasm of the coronary arteries. In other words, amounting to closing them up so far as supplying the heart muscle and because of that the heart ceased to function normally and the man died.

Q. What started the spasm?

A. It’s entirely probable the hemorrhage around the upper end of the aorta did that.

Q. What caused that; did it just happen to him?

A. No, I think not, because there was a break in the intima of the aorta and these breaks are usually due to some sudden strain coming on the vessel.

Q. That's what I want to find out, whether you think the strain had anything to do with it.

A. Yes, I think it did."

CROSS EXAMINATION.

By Mr. Mack:

"I observed hardening of the arteries. I would say there was moderate severity but there was some narrowing of the coronary artery, especially the left, and a narrowing of the vessel in the brain. Angina pectoris is a train of symptoms. It is usually due to a spasm of the artery that supplies the heart muscle.

Q. Wouldn't it take a great deal of strain to effect a hemorrhage?

A. Not in an aorta that is weakened by disease.

Q. Was this weakened by disease and what kind of disease?

A. Arterio-sclerosis, hardening of the arteries.

Q. Was there any hardening in the aorta?

A. Yes, the aorta was involved. Yes.

Q. Was there sclerosis in there?

A. Yes.

Q. To what extent?

A. I would say moderately severe." (R. 149.)
Edna L. Heatfield testified as follows:

"I am the plaintiff in this suit. We have been

married forty years. He was state agent for the Hanover Fire Insurance Company for twenty-six years. He appoints agents. He did the office work in connection with that position. He traveled in his car. His work was not manual labor. He was of a husky build and engaged in no hard manual labor. I never saw him do any such. He looked young for a man of his age and appeared healthy. I did not know he had any heart trouble. He was very high strung and excitable. I was advised of his death at 11 o'clock of July 1, 1942, and I received his personal effects from Smith & Co., undertakers. I received a white Arrow shirt. It was stained and yellow at the shoulders. His collar was wilted and it looked like perspiration. Mr. Selbach advised me in August when he found the policy. I don't remember the date. My son looked through Mr. Heatfield's effects at the office. He found a policy in his vault at the Paulsen Building and I never received proof of loss forms from the defendant." (R. 155.)

CROSS EXAMINATION.

By Mr. Mack:

"I don't remember the date I received Mr. Heatfield's clothes from Smith & Company. I said his shirt was stained as if with perspiration around the collar and the neck down to the shoulder. It was a hot day, June 30, 1942. I don't think my son found any policies. I only made a search of my husband's desk. We found some accident policies besides this one in question. The policies were brought to me at the house. There were two accident policies. I don't know where they were. Mr. Heatfield was high strung and rather excitable when anything unusual went wrong. He never complained of heart trouble to me." (R. 159.)

Dr. Peter Reid testified for the defendant:

“I am a physician and surgeon and reside in Spokane. I have been practicing 35 or 36 years. (Here the Doctor’s qualifications were admitted.) I was present at the autopsy and got a report thereof.

Q. From the autopsy itself, was there anything to determine the cause of the death of Mr. Heatfield?

A. Yes. His death was caused by angina pectoris, a heart condition which will cause death. Mr. Heatfield’s coronary arteries had become hardened, particularly in the left artery, which reduced it one-half of what it ordinarily would be. If the heart is speeded up, not sufficient blood goes through. As a result, it ends in a spasm of the heart muscle and people will die from that condition.

This is a type of case that die at night. When we got there, he was dead. Mr. Heatfield has a pathology to produce that identical condition and that is the reason I base my opinion on the fact he died of an attack of angina pectoris. It would be a continued state of angina and that means a terrific severe pain in the chest.

Q. From what you saw there, what is the fact, please, as to whether considerable exercise or any exercise affected the condition or caused death in this instance?

A. Well, if exercise would influence it at all, the exercise would bring on the attack of angina at the time of the exercise when the need of more blood and more oxygen was necessary in the heart muscle. If exercise were responsible for the cause of angina pectoris, it would come on at the time of exercise and not afterward. If the angina was brought on by the exercise, then it would be con-

tinuous from the time the attack came on following the exercise until death resulted.

Q. Assuming a man sixty-five years of age, such as Mr. Heatfield was, and that he had never had any, never done any hard labor, that his business was merely that of traveling solicitor, that he didn't know he had any condition—no difficulty with his heart—that his health had been reasonably good—very good—and that on the afternoon of the 30th day of June, 1942, he found himself off the road in an automobile which he was unable to move, couldn't be moved by himself, and that he then told a lady he had started his engine after he was in that predicament and tried to back his car up and run it forward, that he laid down there an hour, that it was a reasonably hot day, and that about 6:15 another automobile came in the opposite direction and he went out on the highway and motioned to them by waving his hand to stop them, and did stop them, and they pulled him out; that he looked tired and worn out and that he then went a distance of two or two and one-half miles and stopped to get a drink of water, and was asked if he wanted anything he said he didn't think he needed anything, he took the drink of water and walked back to his car, which was a hundred yards, approximately, from the scene where he got the drink of water, and then half an hour afterward he screamed, and they went to him and brought him back to the camp, put him to bed with all his clothes on, other than his shoes and his coat, talked to him until about 10 or 10:30 in the evening, and after that he was found sometime later than that—dead—would the exercise I have related—oh, I forgot one feature of it—he said to this man at the camp that he had overexerted himself, would what I have related have anything to do with his dying later in the evening?

A. In my opinion, no.

Q. If it did have anything to do with his condition, Doctor, when would his death have occurred?

A. His attack would have come on when the need was greatest on the heart, and would have continued. He might have died afterwards, but there would be symptoms of his attack of angina until his death, without any period in between of comparative comfort.

Q. In your opinion, Doctor, from the examination, the autopsy and what I have related, the exercise took no part in it whatever?

A. That is my opinion.

Q. And if exercise brought on any condition of lack of blood coming into the heart it would be at the time of the exercise?

A. The time when he required more blood in the heart.

Q. Would the fact there was a slight hemorrhage of the aorta aid in causing this man's death?

A. I don't see how it possibly could.

Q. So, in your opinion, his death was due to—

A. Angina pectoris."

DIRECT EXAMINATION.

Dr. D. H. Lewis testified for the plaintiff as follows:

Q. "From the autopsy itself, was there anything to show what was the cause of the death of Mr. Heatfield?

A. The definite cause of death, no; no one could tell.

Q. What, in your opinion, did cause the death from what you saw there at the autopsy?

A. He died from natural, senile causes. In other words, the body just gradually broke down.

Q. Did the condition of the aorta itself disclose any other condition showing the aorta might have caused his death?

A. No, sir.

Q. Would the fact that he died after 10:30 in the evening—would the fact he had been exercising to the extent of overexertion, or looked tired and worn out, have anything to do with his death?

A. You couldn't call that a cause of death, no.

Q. Can you give us a name in your opinion—what, in your opinion, he died of?

A. Well, most probably the thing he died of was angina pectoris. Now that's a hard thing to prove. I couldn't definitely state he did or did not.

A. Will you tell us what is meant by mio-cardial?

A. Mio-cardial of the heart muscle is a degeneration of the muscle of the heart. It has nothing to do with blood supply.

Q. Now, with reference to angina pectoris, do people die in their sleep of that?

A. Let me explain angina pectoris in my way. Angina pectoris is a spasm of the heart muscle. Now, the heart beats rhythmically, it contracts and expands, and so forth. Now, if that contraction becomes a spasm and doesn't allow the heart to expand, shuts off all the oxygen to come to that particular blood stream and they die in a very few seconds.

Q. Does it come on them when they are asleep occasionally?

A. Yes, sir.

Q. In this particular autopsy and the outline I have just given to you, in your opinion, did the exercise have a thing to do with this man's departing from this life?

A. I don't think anything more to do with it than a full meal or a strained bowel movement would have to do with it."

DEFENDANT RESTS.

PLAINTIFF RESTS.

"Mr. Mack: Comes now the defendant in the above-entitled action and moves the Court to dismiss the same and to render a verdict for the defendant for the following reasons:

First: That no notice of any claim for accident was given by the plaintiff within the twenty days required by the policy, it definitely providing that notice thereof shall be given within the twenty days.

Second: There is no evidence or inference from the evidence that Augustus S. Heatfield had overexercised, overexerted or in any manner strained himself whatsoever.

Third: That there is no evidence of death in this case whatsoever by accidental means, or that the same was violent or exclusive of ordinary death.

That the evidence totally fails to establish the cause of death of Mr. Heatfield in so far as the plaintiff's case is concerned.

That the only evidence in this case as to any accidental means is based upon the admission by

this Court of the testimony being on the theory that it is a part of the *res gestae*, and to be a part of the *res gestae* it is obligatory that the proof be made by statements of fact and not statements of conclusions, and under the entire record up to this point, the plaintiff is not entitled to recover.

Whereupon: After argument on the above motion to the Court, the motion was, by the Court, denied and exception allowed."

SPECIFICATION OF ERRORS.

1. Error in denying defendant's motion for non-suit and dismissal at the close of plaintiff's case.
2. Error in denying defendant's motion for a directed verdict at the close of all the evidence.
3. Error in denying defendant's motion to set aside the verdict and judgment for plaintiff, and to enter judgment for the defendant.
4. The Court erred in denying appellant's motion for a new trial.
5. The Court erred in admitting in evidence plaintiff's exhibit C over the defendant's objection.

"Mr. Mack: We object to this for the reason it totally fails to serve any purpose in the case whatsoever. It is incompetent, irrelevant and immaterial and proves no fact or statement or allegation of plaintiff's complaint whatsoever.

The Court: The objection is overruled, and exhibit C is admitted."

EXHIBIT C (R. 77)

"July 8, 1942.

Lamping & Company,
250 Colman Building,
Seattle, Washington.

Gentlemen:

In re. Augustus S. Heatfield, Standard Accident policy No. 97R1387; renewal number, 706997.

Assured died near Curlew, Washington, on June 30th. I am attorney for the estate. He held an accident policy with the Illinois Commercial Men's Association and the Aetna Life, carrying double indemnity. I was employed by the executor and the widow, to represent them in the handling of the estate and also in the matter of collecting on the accident policies. That employment was made on July 1st. It was not until today that I learned Mr. Heatfield had a policy with the Standard Accident Insurance Company as above numbered, therefore, I must advise you that there will probably be a claim made for payment under your accident policy.

The body is being held intact for an autopsy which I intended to have performed on July 10th, until I knew he had this policy with you. If you desire to have an autopsy made or to be represented when the autopsy is taken, and if you cannot make arrangements by July 10th, I think we can hold the body for a day or two longer. In any event, this is your notice that you may have an opportunity to have the autopsy if you desire. I wish you would advise me.

Very truly yours,

Harry M. Morey."

6. The Court erred in admitting exhibit D over defendant's objection.

“Mr. Mack: I object to that as incompetent, irrelevant and immaterial and sustains no allegation of the complaint. This is dated July 30th. It is not sworn to. I am at a loss to understand it. He contends it is a notice of some kind. It is clearly too late for the ordinary notice. If he contends it is a proof of loss, it does not comply with the requirements. It is just a statement in a letter dated July 30th and it could not in any event be any proof of anything in this case. I don't know what the purpose of it is.

The Court: The objection is overruled, it will be admitted. And the jury is instructed with reference to this exhibit, and the last exhibit that was admitted in evidence not as proof of what they say—they are statements made by Mr. Morey and are admitted under the provisions of the policy requiring certain notice to be given and you will consider them for that purpose only. The mere fact that certain statements made in there is not proof the statements are true of the way in which the thing occurred, but are admissible as notice only, and not as proof of facts alleged.” (R. 78.)

EXHIBIT D.

“July 30, 1942.

Standard Accident Insurance Company,
Detroit, Michigan.
Gentlemen:

Re: Accident policy of Augustus S. Heatfield,
97R1387.

I represent Thomas A. Heatfield, executor of the estate of Augustus S. Heatfield, and his widow.

Augustus S. Heatfield died near Curlew, Washington, on June 30th, 1942. It seemed that he was driving his automobile on a mountain road be-

tween Curlew and Colville, Washington. An automobile approaching from the opposite direction crowded him off the road so that the right wheels of his car were down over the bank. Mr. Heatfield was alone at the time of the incident and immediately attempted to get his car back on the road. In so doing he greatly overexerted and strained himself. Finally another motorist towed or pulled his car down the road and Heatfield then drove to a forest ranger camp, where he got out of the car to get some water. Later the attendants at the camp heard a call for help and found Heatfield stretched out on the ground near his car. They took him into camp and put him to bed and the next morning it was discovered he had died.

It is the contention of the executor and widow that the above incidents establish a claim in accordance with the provisions of the above-described policy, and claim is hereby made on you for payment of \$7500, face value of the policy. On July 8, 1943, I wrote Lamping & Company in Seattle, advising them that Heatfield had died and that claim would probably be made under the policy and that we intended to have an autopsy and giving an opportunity to the company to have an autopsy or to be present at the one we were making. Autopsy was held on July 10, 1942. Dr. Peter Reid attended the autopsy in your behalf. There were four persons interested in the making of the autopsy, the widow, the Illinois Commercial Men's Association, the Aetna Insurance Company and your company. The pathologist's fee was \$50. I had an agreement with the Aetna and the Illinois Commercial Men's Association that the Pathologist's fee would be divided between us and just before the autopsy was performed I was informed Mr. M. E. Mack was representing your company. Mr. Mack had no definite authority from you but he indicated

that the Standard Accident Insurance Co. would pay its share of the Pathologist's fee. Therefore, at the proper time, I will ask you to reimburse me in the sum of \$12.50.

Will you please forward such proof of loss forms as you may require?

Very truly yours,
Harry M. Morey."

(R. 79-81.)

7. The Court erred in admitting the following testimony of Thomas A. Heatfield over defendant's objection.

R. 88-89 Thomas Heatfield testified as follows:

"His father had died on June 30, 1942. On July 3, 1942, he drove over the Curlew-Orient Highway, a distance of 22-24 miles, never having been there before.

Q. And did you have an opportunity to observe a place along the road at about the spot where there were automobile tracks that went off the road?

Mr. Mack: To which I object as incompetent, irrelevant and immaterial unless it is shown it has some connection with this particular automobile. If he found tracks there on a road eleven miles long, it doesn't prove a thing.

The Court: I will sustain the objection until such time as you can connect it up with the place. (R. 89.)

The Court: I will overrule the objection." (R. 111.)

Whereupon; the same interrogatory was asked and the answer was: Yes. (R. 111.)

8. The Court erred in submitting the case to the jury whatsoever; there being no proof of the death of Augustus S. Heatfield by accidental or bodily injury caused directly, exclusively and independently of all other causes through accidental means.

The Court instructed the jury:

“Whether or not the notice was a proper notice is purely a question of law and I decided that question. I decided it was a proper notice and proof of loss had been furnished in this case, so far as the affirmative matter contained in the answer and so far as the reply is concerned you need not bother yourselves with them. They simply raised issues of law which have been decided in favor of the plaintiff by me.” (R. 223.)

9. Error in trial court’s holding that notice was given as provided by the policy sued upon within 20 days; such defense being set out in the answer, and no waiver of said notice being plead.

10. Error in admitting the testimony of Thomas A. Heatfield, son of the deceased, as to the condition of the locality where the deceased left the road. Said witness not having been there whatsoever until three days after the occurrence, and no one that ever was there having directed him thereto, and no land mark or object or anything pointed as to the place; his finding being purely based upon nothing but imagination.

11. The Court erred in admitting the testimony over defendant's objection of Floy Harrington and Thomas Callam; said testimony not being a part of the *res gestae*.

Floy Harrington testified that:

"Mr. Heatfield had been there two hours and that he had laid down an hour and it was a hot day. (R. 72.)

Q. You were talking to this man?

A. Yes.

Q. Tell us what he said?

Mr. Mack: I object to that, if Your Honor please, as incompetent, irrelevant, immaterial, self-serving and hearsay.

The Court: Is it part of the *res gestae*? That is the question.

Mr. Mack: It is not part of the *res gestae*.

The Court: Other than the fact as to how he was pushed off the road by some woman driver, she can testify to all other matters. The other portion is admissible under the *res gestae* and under the rule permitting a witness to testify as to the statements made by a deceased person as to his physical suffering. (R. 67.) You may ask the witness the question as to what he said to the witness.

Q. Tell what he said?

A. Well, as I said, he was holding his hands sort of like that and he said: 'I have an awful pain. I have a pain in my heart, the first time in my life I ever had trouble with my heart.' He said it was so hot and he got so tired and

exhausted he had to lie down. He said he had been there an hour and I asked him if he tried to get his car out.

Mr. Mack: I object to what he said. It is not part of the *res gestae*.

The Court: Objection overruled.

A. And he said yes. He had tried to back up and tried to go forward and he couldn't go either way. He tried to get it out and he couldn't by himself. (R. 71.) And he said he had been there two hours. He said he had laid down an hour. Yes, it was real hot. Yes, he had started the motor up and tried to get it up on its own power." (R. 74.)

Thomas Callam testified:

"Q. Did this man say anything to you about any work he had done down on the road?

Mr. Mack: I object to that as incompetent, irrelevant and immaterial, a self-serving declaration, hearsay and not having been established as a part of the *res gestae* and not a statement of fact.

The Court: Objection overruled.

A. He said he had overexerted himself.

Mr. Mack: I move to strike that as a conclusion and not a statement of fact.

The Court: Motion denied."

12. The Court erred in admitting the testimony of Drs. Myhre and Snyder; there being no foundation upon which it could be legally based or admitted.

13. The Court erred in denying the appellants

motion to dismiss the action, based on the motion to dismiss. The allegations of the complaint being wholly insufficient to establish the death of Augustus S. Heatfield by accidental means, effected directly, exclusively and independently of all other causes by accidental means.

Defendant filed motion to dismiss on the ground that the complaint does not state facts sufficient to constitute a cause of action. (R. 13.)

The Court in his order considered the demurrer as a motion to dismiss and ordered said motion for dismissal and the same is hereby denied. (R. 25.)

SUMMARY OF ARGUMENT

1. The action should have been withdrawn from the jury and judgment entered for the appellant. (Specifications of Error 1, 2, 3 and 4.)

(a) There was a total failure of giving any notice as provided by Paragraph D4 of the policy as follows:

“Written notice of injury on which claim may be based must be given to the company within twenty days after the date of the accident causing such injury.” (R. 5.)

(b) If E5 ever came into play, there was a total failure of proof of any showing it was not, reasonably possible to give the notice required in D4. It

was not shown that a notice was given as soon as reasonably possible, the burden of proof being on the beneficiary. E5 reading as follows:

“Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the Company at Detroit, Michigan, or to any authorized agent of the Company, with particulars sufficient to identify the insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.” (R. 5.)

(c) There was no notice as required in E5, it was “with particulars sufficient to identify the insured.” This was totally ignored. No identification of insured except his name. Paragraph S of policy reads as follows:

“S. Full compliance of the insured and beneficiary with all provisions of this policy is a condition precedent to recovery hereunder and any failure in this respect shall forfeit to the Company all right to any indemnity.”

Hanley vs. Occidental Life Insurance Company,
164 Washington 320:

“The agreement of the parties was that the failure to give the notice required by this certificate should invalidate all claim under it and there can be no question but that the serving of this notice was a condition precedent to the enforcement of any such claim.”

Wilcox vs. Massachusetts Protective Assoc., 165 N. E. 429:

“The plaintiff must fail in this action unless the notice required by the policy was given.”

2. The Court should have denied the introduction of Exhibits C and D. Specifications 5 and 6.

The defendant's objection to these exhibits was that they were incompetent, irrelevant and immaterial and tended in no way to prove any allegation alleged in the plaintiff's complaint. The allegation is that the notice required in the policy was given of the death of the deceased and that claim would probably be made and Exhibit C is dated July 8, 1942; Exhibit D July 30, 1942, and under the interrogatories introduced in evidence appellant admitted that it was received by it in the form of a letter which is dated and mailed July 8, 1942, the deceased having departed this life on June 30, 1942.

The question is was the notice sufficient as provided by Paragraph D4 above quoted.

A reading of the notice Exhibit C dated July 8, 1942, advises that Augustus S. Heatfield died. That is the end of that story. It nowhere states by or through accidental means nor any inference as to his death being accidental.

Thompson vs. United States Casualty Company, 6 N. E. 2nd 769:

“But notice of death alone is not sufficient. The policy is not a life insurance policy. It insures against death resulting from accident and notice which is expressly required is notice of accidental death. At least the notice must be such as under the existing circumstances will by fair construction inform the company that the insured has met death through accident.”

Barnett vs. John Hancock Mutual Life Insurance Co., 126 A.L.R. 608:

“The purpose of proof is to apprise the defendant that a death has occurred under such circumstances that the indemnity has become payable.”

City Bank Farmers Trust Co. vs. Equitable Life Assurance Co., 285 N. Y. S. 250:

“The claimant’s affidavit merely states further in each case that death was caused by carbon monoxide gas — which merely submitted proof without alleging any fact from which it could be inferred it was accidental.”

Wachel vs. Equitable Life Assurance, 194 N. E. 850. The beneficiary before bringing suit served upon each insurance company notice and proof of death of assured. Only in the proof served upon the Travelers Insurance Company is there any allegation or suggestion that death was due to accident to the left leg in the early part of July, 1930. The notice gave

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the cause of death as coronary thrombosis.

The Court said:

“Coronary thrombosis is concededly a disease thus the proofs of death are not sufficient to show death was caused exclusively by accidental means but showed affirmatively that death was due to disease.

Proof of death by accident is a condition precedent to liability by double indemnity and under the proofs the plaintiff was required to show performance of this condition.”

The Court of Appeals of New York held the beneficiary could not recover, reversing the appeal division.

Commercial Casualty Company vs. Stimson, 111 Federal 2nd p. 63. At p. 68 the Circuit Court of Appeals said:

“Some proof of death, due to accidental causes was all that was required.”

3. The Court erred in admitting the testimony over defendant's objection of Floy Harrington and Thomas Callam and Thomas Heatfield covered by specifications 7, 10 and 11.

(11) The Court admitted the testimony of Floy Harrington and Thomas Callam as being part of the *res gestae*. It being statements of the deceased in which he said to Floy Harrington, that he had an

awful pain and I never had pain in my heart before. He said it was so hot and he got so tired and exhausted he had to lie down. He said he had been there two hours and that he had to lie down an hour. After Floy Harrington had been with him twenty minutes, he drove his own car a distance of approximately three miles and said to Thomas Callam in which he remarked he had overexerted himself.

The statements have no reference to any main event nor attempting to explain one nor have reference to anything explanatory of what he did and they are no proof of anything excepting he was tired and exhausted by reason of it being a very hot day and are inadmissible for any purpose.

Jones, on Law of Evidence, Section 360. Speaking of declarations as being admissible, the writer says:

“If they are spontaneous and tend to explain the transaction and if so slight an interval of time has elapsed as to render premeditations impossible.”

Henry vs. Seattle Electric Co., 55 Wash. 447. A street car and a wagon collided. The street car continued on its run and returned in about 30 to 45 minutes. When asked what the conductor said he testified:

“He got off the car and he come over to me and he says: ‘Were you hurt?’ I says, ‘I was not.’ He says, ‘You come out lucky.’ I told him I thought I did. He says, ‘This motorman is green at the business’.”

The Court at 448:

“In order to be a part of the *res gestae*, the subsequent declaration must explain or in some way characterize the main fact. It must not be the narration of a past event, nor the expression of an opinion. In the evidence before us, the words of the conductor did not form part of the main transaction; nor did they in any manner qualify or explain any act of the driver of the wagon, or the employees of respondent at the time of the happening of the accident. It was nothing more than an expression of an opinion which was in no sense competent, and was properly stricken.”

Yarbrough vs. Prudential Insurance Co. of America, 99 Fed. 2nd, 874:

“*Res gestae* must spring from the main fact; it presupposes a main fact and it means the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. ‘One peculiarity of the main fact or transaction ought to be noted, and that is that it is not necessarily limited as to time—it may be a length of time in the action. The time of course depends on the character of the transaction’.”

Chesapeake & O. Ry. Co. vs. Mears, 64 Fed. 2nd, 291:

“To render them admissible what is required is: (1) There be some shock to the feelings sufficient to render the utterance spontaneous and unreflecting; (2) ‘the utterance must have been before there has been time to contrive and misrepresent, i.e. while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance’; and (3) it must relate to the circumstance causing the shock to the feelings.”

Bonner vs. Texas Co. 89 Fed 2nd, 291:

“The general rule that statements by a person not under oath and not subject to cross-examination, although he be since deceased, are not to be received in evidence, we recently examined along with the established exception touching *res gestae* in *Halleck vs. Hartford Accident & Indemnity Co.* (C. C. A.), 75 F. (2nd) 800, a case from Texas, and what was there said need not be repeated. It does not well appear here that the transaction of the explosion was still on foot, speaking through this man in exclamatory or at spontaneous words. Though suffering, the declarant was far in time and space from the explosion, and had been with several persons so that a spontaneous impulse to speak could have expended itself. He was calm, and solicitous for his wife, thus talking not of his relationships to life. What he said about the explosion was not spontaneous, but in response to questions put to him. The words ‘They have gotten me this time’ seem to show an effort to place the blame of the occurrence, though possibly he was referring only to the machines. We think the court was well justified in treating this as a narrative of past events, and thus not *res gestae* but hearsay.”

Field vs. The North Coast Transportation Co., 164 Wn. 123. While the stage driver was on the stand, plaintiff's counsel asked the following question:

“Q. Let us ask you whether or not immediately following the accident a gentleman came up to you and expressed himself very critically to you about the way that you were driving, the manner you were driving on the pavement.”

After objection, the court admitted it as part of the *res gestae* and the witness' answer was “He did.”

The Supreme Court of Washington said at p. 127:

“Was the gentleman's expression admissible under the *res gestae* rule? It is argued by counsel for Field that it was, because of its near coincidence in time and place with the occurrence of the accident. Let us concede that the expression was sufficiently near in time and place to come within the *res gestae* rule, and also sufficiently spontaneous; still, to our minds that does not necessarily render it admissible under the *res gestae* rule. The inquiry still remains: Did the gentleman's expression contain any statement of any fact provable by any such spontaneous expression?”

It clearly was not proven to be any expression of a fact. All we can possibly make of it is that the gentleman seemed to be of the opinion that the stage was being carelessly driven. Such an expression is far different from a witness' spontaneous saying, under the dominating promptings of an occasion, ‘The brakeman kicked me off the train,’ as in *Dixon v. Northern Pac. R. Co.*, 37 Wash. 310, 79 Pac. 943, 107 Am. St. 810, 68 L.R.A. 895; ‘The conductor kicked me off the

car' and 'The boy is off,' as in *Britton v. Washington Water Power Co.*, 59 Wash. 440, 110 Pac. 20, 33 L.R.A. (N.S.) 100; 'My! Art, that car is coming fast,' and 'I am in no hurry,' as in *Heg v. Mullen*, 115 Wash. 252, 197 Pac. 51; and 'I was operating the car at about twenty-five or twenty-eight miles an hour,' as in *Lucchesi v. Reynolds*, 125 Wash. 352, 216 Pac. 12. These were each an expression stating a specific fact and not a mere statement of opinion or feeling upon the part of the one making it."

Beck vs. Dye, 200 Wn. 1.

The lower court over defendant's objection as part of the *res gestae* permitted the witness to be asked whether he had heard any one at the scene of the accident make any statement as to how it had happened, in the presence of the defendant and he answered:

"Some of the people said he went through the red light."

This court has had frequent occasion in the past to consider the so-called *res gestae* rule with respect to the admission of testimony concerning statements made by participants in a transaction or by other persons present thereat. We have taken the pains to examine the cases on the subject as listed in the *Washington Digest Annotated*, topic "Evidence," key numbers 118 to 128 inclusive; we make this reference only because the cases are too numerous to set forth by specific citation in this opinion.

A careful examination of those cases, read chronologically and as a whole, will reveal that the rule as adopted, declared, and followed by this court requires that the statement or declaration concerning which testimony is offered must, in order to make such evidence admissible, possess at least the following essential elements: (1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past completed affair; (3) it must be a statement of fact, and not the mere expression of an opinion; (4) it must be spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation, and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made. * * *

The term “*res gestae*” is not a mere shibboleth

by an indiscriminate use of which every unsworn statement made during a particular transaction or occurrence is to be admitted. It is a doctrine which recognizes that, under certain circumstances, a declaration may be of such spontaneous utterance that, metaphorically, it is an event speaking through the person, as distinguished from a person merely narrating the details of an event.

Watson vs. A. M. Byers Co., 14 Atlantic 2nd, 201, the Court at p. 203 said:

“They were not spontaneous utterances accompanying or springing out of the accident or succeeding it so closely in time and place as to be a part of the occurrence and not the narration of a past event but were concerning matters that occurred a considerable time after the accident and were elicited in response to questions and clearly should have been excluded.”

Wigmore on Evidence, 3rd Ed., Section 1753,
THERE MUST BE A MAIN OR PRINCIPAL
ACT.

“The limitations mentioned for cases under the exceptions that there must be a main or principal act already relevant to the case to which the declaration relates. * * * What is required here is merely that there shall be some startling occurrence calculated to produce nervous excitement and extemporaneous utterances.”

Section 1754, DECLARATIONS MUST ELUCIDATE THE ACT.

“There is, however, one aspect in which the limitation becomes a real one for the matter to be elucidated is by hypothesis, this occurrence or act which has led to the utterance and not some distinct and separate and prior matter. Apparently the courts are disposed on one theory or another to enforce this restriction.”

IV. The Court erred in submitting the case to the jury whatsoever and in holding that notice was given as provided by the policy within twenty days. (8 and 9.)

Hanley vs. Occidental Life Insurance Co.,
164 Wn. 320;

Wilcox vs. Massachusetts Protective Assoc.,
165 N. E. 429;

Thompson vs. United States Casualty Co.,
6 N. E. 2nd, 769;

Barnett vs. John Hancock Mutual Life Insurance Co., 126 A. L. R. 608;

City Bank Farmers Trust Co. vs. Equitable Life Assurance Co., 285 N. Y. S. 250;

Wachtel vs. Equitable Life Assurance, 194
N. E. 850;

Commercial Casualty Company vs. Stimson,
111 Fed. 2nd, 63.

V. The Court erred in admitting testimony of

Drs. Myhre and Snyder there being no foundation upon which it could be based or admitted.

VI. The Court erred in denying the appellant's motion to dismiss the action.

Hanley vs. Occidental Life Insurance Co.,
164 Wn. 320;

Wilcox vs. Massachusetts Protective Assoc.,
165 N. E. 429;

Thompson vs. United States Casualty Co.,
6 N. E. 2nd, 769;

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Wachtel vs. Equitable Life Assurance, 194
N. E. 850;

Commercial Casualty Co. vs. Stimson, 111
Fed. 2nd, 63.

ARGUMENT

After both parties had rested, the defendant at R. 218 moved the court to dismiss the action and to render judgment for the defendant for the following reasons:

(1) That no notice of any claim for accident was given by the plaintiff within twenty days.

(2) That there was no evidence or inference therefrom that Augustus Heatfield had overexercised, overexerted or in any manner strained himself.

(3) That there was no evidence of death by accidental means.

(4) That the only evidence in the case as to accidental means is based upon the admission of res gestae testimony and that they were statements of conclusions and not statements of facts and under the entire record plaintiff is not entitled to recover.

That in Paragraph V, R. 4, "the allegation of the plaintiff is that death was approximately, and exclusively and independently of all other causes by overexertion and strain."

The evidence is by Ralph Harrington that the decedent had a shovel lying in the back of his car. (R. 52.)

"I don't know what he did at all." (R. 63.)
Floy Harrington testified:

"Well, as I said he was holding his hands sort of like that and he said, 'I have an awful pain. I have a pain in my heart, the first time in my life I ever had any trouble with my heart.' He said it was so hot and he got so tired and ex-

hausted he had to lie down. (R. 70.) He said he had been there two hours. He said he had laid down an hour, that it was real hot." (R. 72.)

That Mr. Harrington testified that he attached the front bumper to the front bumper of the deceased's car and while the deceased was operating his car, he pulled him out. (R. 60.)

This operation took approximately twenty minutes and the deceased drove three miles to a camp. There he had a conversation with Thomas Callam in which he said that the deceased said he had overexerted himself. (R. 109.)

Thomas Heatfield testified he was the son of the deceased. He said his father was 65 years of age, that he died on June 30, 1942. That he went on July 3, 1942, from Curlew to Orient a distance of 24 miles and on that road he observed a spot where automobile tracks went off the road. (R. 114.) Midway over the 24 miles he met a Mr. Abrahams, that he wrote nothing down, that he had not located the place yet, that he had never seen the road before and then he located the place. (R. 164.) Mr. Abrahams had never seen his father where the automobile went off the road. (R. 177.)

Dr. Myhre testified (R. 131), that from the autopsy you could not tell that the deceased overexerted himself. Dr. Myhre further testified (R. 124) that exer-

tion will not cause coronary stenosis.

Dr. Reid testified for the defendant that exertion could not have caused this man's death whatsoever. (R. 187.)

Dr. Lewis testified that the fact the deceased had been exercising to the extent of overexertion or looked tired, worn out had nothing to do with his death. (R. 205.)

All the testimony appears in the foregoing statements with reference to any overexercise or strain. There is not a witness who testified that they had seen him doing anything whatsoever and from the beginning to the end of this case, there was no ground for any assumption that he had overexerted himself or strained himself and there was positively nothing for the jury. Dr. Snyder testified additionally, that the hypothetical question assumed that he had done a lot of hard work and it was based upon this assumption in that question that he had done considerable overexercising, that the strain must have caused his death.

Then we have another feature. Mrs. Floy Harrington testified definitely that the deceased had been lying down for an hour and when we couple that with the fact that the deceased was an insurance man, he had more than sufficient opportunity to have

deliberated on what he should say when interrogated.

MacGerry vs. Rodgers, 144 Wn. 375, the Supreme Court of Washington states at p. 378:

“Upon the trial, respondent testified to the break between herself and the appellants, testified that she was ordered from their home and that she went some two or three miles to the office of a doctor whom she had met before, and there sought refuge. The doctor was then called as a witness on her behalf, and testified to respondent’s arrival at his office, her mental and physical condition when she arrived, and then, over objection, was permitted to detail all that respondent then told him as to what had occurred between Mrs. Rodgers and herself causing her to leave appellant’s home. It is attempted to justify the admission of this evidence upon the ground that it was a part of the *res gestae*. We cannot so hold. In the time it took to go from the Rodgers home to the doctor’s office, there was ample opportunity for respondent to plan how best to appeal to the doctor’s sympathy, and her then situation made her absolutely dependent upon the sympathy of some one. The situation was such as to exclude the very basis of the *res gestae* doctrine, and the testimony referred to was hearsay and prejudicial.”

Somogyi vs. Cincinnati, N. O. & T. P. Ry. Co., 101 Fed. 2nd, 480, the Sixth Circuit Court of Appeals said at p. 481:

“The *res gestae* rule permits reception of statements substantially contemporaneous with the event if they are explanations of a spontaneous nature arising from the transaction itself before

the declarant has had opportunity for deliberation or reflection.”

Aetna Life Insurance Co. vs. Kern-Bauer, 62 Fed. 2nd, 477. In this case one witness who saw Kern stated, “that he did not drink, that he was driving his car and the lights blinded him.” The other testified that Kern said the lights blinded him.

The Court went on to say:

“These statements as to the blinding lights are the only evidence in the record as to the cause of his car running off the road and were admitted over objection.”

Tenth Circuit Court of Appeals at p. 479 said:

“Applying the rule to the case at bar, we are of the opinion that the evidence was inadmissible. The burden is upon the proponent of evidence to show its admissibility. That burden was not carried. If both witnesses were testifying to the same statement, and if it was made as soon as they found him, the record is still silent as to how long a time elapsed, or what transpired, between the time the lights blinded him and his narration of the event. It may have been three minutes or three hours. We do not know that in the interval he ran a block off the pavement, yet stopped his car without damage to it or visible injury to himself, and turned off the ignition. We do know he was able to comprehend a question as to his drinking and give a sensible and exculpatory answer thereto. We do know his spells of pain were recurrent; he was having one when assistance came; then he said he was able to drive his own car to Wichita; half an hour

later, he had another seizure which terminated in his death. Upon this record, he may well have been sitting in his car for hours, between spells, reflecting on many things, including an explanation of the accident. The proof leaves the circumstances in the realm of pure conjecture, and that is not enough."

II. With reference to the admission of Exhibit C. It was essential under the policy Paragraph D4, that the plaintiff or some one in her behalf do two things:

(a) Give notice of accidental death or injury.

(b) With particulars sufficient to identify the insured.

A reading of Exhibit C must disclose to Your Honor that there is positively no reference therein whatsoever to any accident occurring. It merely says the following: "Augustus S. Heatfield, the assured, died near Curlew, Washington, on June 30, 1942. He held an accident policy with the Illinois Central Men's Association and the Aetna Life Insurance Co. I was employed by the executor and the widow to represent them in the holding of the estate and in the matter of collecting on the accident policies." What policies? The two previously named. "I learned today that Mr. Heatfield had a policy with the Standard Accident Insurance Company as above numbered, therefore I must advise you that there will probably be a claim made under this accident policy."

Merely stating to the insurer that this man held a policy in their company most certainly did not advise them that an accident had transpired. Saying that a claim would be made under an accident policy does not advise them that an accident has transpired. If it is so interpreted, all the insured or the beneficiary need to do is to say: "John Smith holds a policy in your company and claim will be made thereunder." What would the insurer know? Positively nothing. Now let us add the words "accident policy" to the above statement and what would the insurer know or let us make it a life policy and what would the insurer know? It would simply know that a policy was held and some character of a claim would eventually be made.

It was the duty of the beneficiary to advise the company that an accident caused the death of Augustus S. Heatfield. There was no statement in Exhibit C that his death was caused by accident, that he was injured in any manner by accident or that any accident had transpired and it was their duty to furnish some notice within twenty days.

Moran Bros. vs. Pacific Coast Casualty Co., 48 Wn. 592:

"This policy provides the assured, upon the occurrence of an accident shall give immediate written notice thereof * * * to the home office

of its company or to its duly authorized agent in the locality in which this policy is issued.”

The Court in interpreting the meaning of this notice at p. 596 said:

“We think the essential object of this report is to give the company notice, and notice at once, of the character of the injury and the probability of liability, and it is not intended that any mistake which the employer might make in giving his version of the facts would render the policy ineffectual.”

Hanley vs. Occidental Life Insurance Co.,
164 Wn. 320;

Thompson vs. United States Casualty Co., 6
N. E. 2nd, 769;

*City Bank Farmers Trust Co. vs. Equitable
Life Assurance Co.*, 285 N. Y. S. 250;

Wachtel vs. Equitable Life Assurance, 194
N. E. 850.

Respectfully submitted,

M. E. MACK,

Attorney for Appellant.

IN THE

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Appellant,

vs.

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*Upon Appeal from the District Court of the United
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HONORABLE L. B. SCHWELLENBACH,
United States District Judge

APPELLEE'S BRIEF

FILED

NOV 8 - 1943

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EMPIRE PRINTING CO., SPOKANE

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JURISDICTION

We believe the District Court had jurisdiction as appears from the Petition for Removal from the State to the Federal Court (Tr. p. 19-20) and the Order of Removal (Tr. p. 22-23) all of which, together with the law applicable appears on page 1 of appellant's brief.

We believe this Court has jurisdiction as appears on page 1 of appellant's brief.

STATEMENT OF THE CASE

Appellant's brief substantially sets forth the material elements of the pleadings and the action of the trial court with reference thereto.

The appellee desires to supplement the statement of the case and will try to set forth the material portions of the testimony that were admitted without objection and of the testimony admitted over objection.

EVIDENCE ADMITTED WITHOUT OBJECTION:

Assured was 65 years of age. He was a Special Agent for an insurance company (Tr. p. 151). He was not accustomed to doing hard, manual work (Tr. p. 152). He had never been bothered with heart trouble (Tr. p. 152). His health had always been good (Tr. p. 153). He was of an excitable, nervous disposition (Tr. p. 153).

He left his home in Spokane, Washington, on the morning of June 30, 1942, by automobile for Republic and Colville and when he left he was in his customary

good health (Tr. p. 153). An old friend talked with him at Republic, Washington, about two o'clock in the afternoon of that day and he was "the same old Gus" and no evidence of physical ailment (Tr. p. 47). The friend directed him to go to Curlew, a distance of 21 miles from Republic (Tr. p. 48) and then over the Curlew-Orient Road.

The Curlew-Orient Road is an unfrequented highway with few farms or ranches along its course. The nearest farm to the scene of the events hereinafter recited was the home of Ralph Harrington, three miles toward Curlew (Tr. p. 50).

About six p.m. on June 30, Ralph Harrington and his wife, Floy, were driving from Orient to their home, and saw assured alone, signaling for help. Assured's car was definitely off the road to such an extent that Harrington had to tow it back (Tr. p. 51-52). Harrington testified: "Well he seemed pretty tired and fagged out, and seemed worried. * * * The car was there to stay without help. * * * There was a rock under the running board in front of the rear wheel and that dirt was soft on that side and it just kept burying down. He had evidently tried to build it up and get it back on this boulder to get back on the road, but it was so soft all his efforts was lost whenever he tried it" (Tr. p. 52).

Harrington said assured had a shovel and testified: "You could see where he had shoveled dirt all right" (Tr. p. 52).

It had taken Harrington one and a half hours to drive from Colville to that scene (Tr. p. 53).

Plaintiff's exhibit "A" (a photograph) was shown witness Harrington and he said the picture looked like the place, and the photograph was admitted in evidence without objection (Tr. p. 53).

The Forest Ranger's Camp was two miles east of the scene (Tr. p. 61).

Witness Harrington further testified that two or three days after that event he talked with a young man named Heatfield at the Harrington place and he told this young man "as near as I could" where the car had been off the road (Tr. p. 63-64).

Portions of the deposition of Thomas A. Heatfield, son of assured, were read into the record. The following testimony was offered by appellant's counsel on his own cross-examination and no objection was made by the appellee.

"Q. You testified, Mr. Heatfield, if I understand you correctly, that there was considerable—that there was about 500 or 600 pounds of earth removed?

"A. Yes.

"Q. And that was moved from the shoulder of the road?

"A. Yes." (Tr. p. 173)

Thomas A. Callan testified without objection that he was staying at a Forest Ranger's Camp at the summit of the road and that about 6:30 p.m. on that date, assured called at the camp, and that he was sick; that he was trying to vomit; and that at one time he was lying

down by his car; and that part of the time he was stooped over "like he was sick"; and that he said that he did not need any help. Callan said he put the assured to bed and the next morning the men in the camp found he had died during the night (Tr. pp. 97-109).

Plaintiff in the case testified without objection that when she saw assured's top shirt "it was stained and yellow clear to the shoulders, the collar was wilted and stained clear through with what I took to be perspiration" (Tr. p. 153).

Floy Harrington testified that she was the wife of witness, Ralph Harrington, and that she was with Harrington when assured was found by the road. Without objection she testified that "he seemed quite hot and tired, really exhausted, would be my word—looked like he was all in" (Tr. p. 66).

TESTIMONY ADMITTED OVER OBJECTION:

Over objection Floy Harrington testified: "Well, as I said, he was holding his hands sort of like that and he said: 'I have an awful pain. I have a pain in my heart, the first time in my life I ever had trouble with my heart.' He said it was so hot and he got so tired and exhausted he had to *like* down. He said he had been there an hour and I asked him if he tried to get his car out—and he said yes, he had tried to back up and tried to go forward, but he could not go either way. He said his car was stuck there and he tried to get it out and he could not by himself" (Tr. pp. 70-71).

On cross-examination by appellant's counsel, she

testified: "He said he had been there for two hours. He said he laid down an hour (Tr. p. 72). He was standing kind of dejected like, like you would if you had been working hard and were over tired or over-worked or dog tired—overheated" (Tr. p. 75).

Witness Thomas Callan testified over objection as follows:

"Q. Did this man say anything to you about any work he had done down the road?

"A. Yes, he said he had over exerted himself."
(Tr. p. 109)

Dr. W. N. Myhre testified that in his opinion Mr. Heatfield died of miocardial insufficiency caused by over-exertion (Tr. pp. 122, 125, 128). Dr. George A. C. Snyder testified that assured died of coronary insufficiency caused by over-exertion (Tr. pp. 143-144).

SUMMARY OF ARGUMENT

I. The complaint stated a cause of action.

Horsfall v. Pacific Mutual Life Ins. Co., 32 Wash. 32; 72 Pac. 1028;

Hodges v. Mutual Benefit H. & A. Assn., 15 Wash. (2) 699; 131 Pac. (2) 937;

Maryland Casualty Co. v. Pioneer Sea Foods Co., 116 F. (2) 38;

Zinn v. Equitable Life Ins. Co., 6 Wash. (2) 379; 107 Pac. (2) 921;

Carpenter v. Pacific Mutual Life Ins. Co., 145 Wash. 679; 261 Pac. 792;

U. S. Mut. Acc. Assn. v. Barry, 33 L. Ed. 60; 131 U. S. 100;

Pierce v. Pacific Mutual Life Ins. Co., 7 Wash. (2) 151; 109 Pac. (2) 322;

Kearney v. Washington National Ins. Co., 184 Wash. 579; 52 Pac. (2) 903.

II. There was ample testimony introduced in evidence without objection to take the case to the jury.

III. The trial court committed no error in admitting certain portions of Thomas A. Heatfield's deposition.

IV. The trial court committed no error in admitting in evidence the testimony of Floy Harrington and Thomas Callan, same having been admitted under the doctrine of *res gestate*.

Bothell v. The City of Seattle, 17 Wash. 263;
49 Pac. 491;

Shearer v. Town of Buckley, 31 Wash. 370;
72 Pac. 76;

Buell v. Park Auto Trans. Co., 132 Wash. 92;
231 Pac. 161;

Starr v. Aetna Life Ins. Co., 41 Wash. 199;
83 Pac. 113;

Hines v. Foster, 166 Wash. 165; 6 Pac. (2)
597;

Preferred Acc. Ins. Co. of N. Y. v. Combs,
76 Fed. (2) 775;

Collins v. Equitable Life Ins. Co., 130 A. L. R.
287; 8 S. E. (2) 825;

Chesapeake & Ohio Ry. Co. v. Mears, 64 Fed.
(2) 291.

V. The tendency of the courts is to extend rather than restrict the introduction of evidence under the doctrine of *res gestae*: and in any event, whether evidence is properly admitted is left to the sound discretion of the trial court and error will not be declared

unless there has been a manifest abuse of discretion.

Chesapeake & Ohio Ry. Co. v. Mears, 64 Fed. (2) 291;

Fort St. Union Depot Co. v. Hillen, 119 Fed. (2) 307;

Rast v. Mutual Life Ins. Co. of N. Y., 112 Fed. (2) 769;

William C. Barry, Inc., v. Baker, 82 Fed. (2) 79;

Wilkins v. Knox, 142 Wash. 571; 253 Pac. 797.

VI. The trial court committed no error in ruling that Exhibit "C" hereinafter called the "letter of July 8" was notice to the appellant as required by the policy.

33 C. J. (Ins.) page 16;

McKillips v. Ry. Mail Assn., 10 Wash. (2) 122; 116 Pac. (2) 330.

VII. There having been no proper exception taken to the court's instructions, the instructions became the law of the case.

Rules of Civil Procedure, Rule 51, 28 U. S. C. A.;

Krug v. Mutual Benefit Health & Acc. Assn., 120 Fed. (2) 296.

ARGUMENT

The Supreme Court of the State of Washington in the case of *Horsfall v. Pacific Mut. Life Ins. Co.*, 32 Wash. 132; 72 Pac. 1028, held that death by unusual exertion or by exertion under unusual circumstances was death by "accidental means" under a policy that had more restrictions in favor of the insurer than the Heatfield policy has.

We quote from the opinion: "death by accident is defined to be 'death from any unexpected event, which happens as by chance, or which does not take place according to the usual course of things' so a sprain of the muscles of the back, caused by lifting heavy weights in the course of business, is injury by accident or violence occasioned by external or material causes operating on the person of the assured."

Until reversed that decision became the law of the State of Washington and became binding on the Federal Courts functioning as such within the State of Washington.

Erie Ry. Co. v. Tompkins, 82 L. Ed. 1188;
114 A. L. R. 1487; 304 U. S. 64;
Maryland Casualty Co. v. Pioneer Seafoods Co., 116 Fed. (2) 38.

In the case last cited, this Court had occasion to pass on what constituted an "accident" and said:

"The problem here is one of interpretation of the contract, a question, the decision of which is controlled by the State Law * * * *Erie Ry. Co. v. Tompkins*, 304 U. S. 64, * * *. In *United States Mutual Acc. Assn. v. Barry*, 131 U. S. 100; 33 L.

Ed. 60, it is said that 'if in the act which precedes the injury something unforeseen, unexpected, unusual, occurs which produces the injury, then the injury has resulted through accidental means.' That rule has been approved in *McNally v. Maryland Cas. Co.*, 162 Wash. 321, 325; 298 Pac. 721. A similar statement may be found in *Horsfall v. Pacific Mutual Life Ins. Co.*'

In the case of *Zinn v. Equitable Life Insurance Company*, 6 Wash. (2) 379; 107 Pac. (2) 921, the Supreme Court of the State of Washington very definitely held that death may be by accidental means even though the insured intended to do the thing which he did. The opinion points out that Washington differs from many other jurisdictions in that respect, but definitely announces the rule as above set forth.

We quote from the opinion:

"The authorities reflect two clearly defined lines of thought on this question. One line * * * holds that death is not accidental in cases in which an unusual or unexpected result occurs by reason of the doing of an intentional act on the part of the insured; that it must appear that the means used was accidental, and that it is not sufficient to show that the final result was unusual, unexpected or unforeseen. The other line of cases holds that, where injury or death is the unusual, unexpected or unforeseen result of an intentional act, such injury or death is by accidental means even though there is no proof of mishap, mischance, slip, or anything out of the ordinary in the act or event which causes the injury or death. * * * Other cases * * * uphold the idea that death is accidental even though the means are intentional when the results are unusual, unexpected or unforeseen. We feel that the principle of law an-

nounced in the cases last cited reflects the great weight of authority and rests upon sound legal principles."

The Supreme Court of the State of Washington held in the cases of *Kearney v. Wash. Nat. Ins. Co.*, 184 Wash. 579, 52 Pac. (2) 903, and *Pierce v. Pac. Mut. Life Ins. Co.*, 7 Wash. (2) 151, 109 Pac. (2) 322, that even though an assured may have a physical ailment which may contribute to his death or disability, nevertheless his death or disability is caused by "accidental means" if the "accidental means" has been the predominant cause of his death or disability.

After the Heatfield case was started the opinion of the Supreme Court of the State of Washington came down in the case of *Hodges v. Mut. Ben. H. & A. Assn.*, 15 Wash. (2) 699, 131 Pac. (2) 937, in which that court said that Hodges' death was not by "accidental means," but instead of upsetting the *Horsfall* decision the opinion reaffirms the law as announced in the *Horsfall* case. The Court disallowed recovery for the plaintiff in the *Hodges* case because the undisputed testimony showed that Hodges was doing something he was in the habit of doing. According to the undisputed testimony in that case there was nothing unusual or out of the ordinary in Hodges' dancing. It was something he did regularly every two weeks.

There were no exceptions taken to the instructions of the Court in the Heatfield case on this question. The instructions followed the law as announced in the cases next above set forth and other cases of a similar nature,

and the instructions became the law of the Heatfield case.

Furthermore the appellant has not argued this question in its brief and has cited no authorities other than that the complaint did not state a cause of action because, as it claims, the letter of July 8 was not notice of claim. We maintain that the complaint stated a good cause of action as far as "accidental means" is concerned.

The next question is whether the plaintiff introduced sufficient evidence to take the case to the jury.

Some cases must and should go to the jury on circumstantial evidence. A good example of that is the decision of this Court in the case of *Occidental Life Insurance Company v. Thomas*, 107 Fed. (2) 876, in which this Court approved the entry of judgment for the plaintiff in a drowning case where there was no direct evidence that Mr. Thomas had fallen in the lake and drowned. The judgment was based on circumstantial evidence only.

In the Heatfield case no one saw Mr. Heatfield doing any hard, manual labor on his car. But the following facts stand out definitely and positively even without the objected testimony of Mrs. Harrington, Mr. Callan and young Mr. Heatfield.

Mr. Heatfield was in good health when he left his home on the morning of June 30. He had never noticed any heart trouble. He was in his customary good health at two o'clock on that day. At six o'clock he was found

with his car definitely off the road. There was no garage or service station anywhere at hand. The nearest farm was three miles away. He was an hour and a half drive from his destination of Colville. He was of an excitable and nervous disposition. He had never been in the habit of doing hard, manual work. When found by the Harringtons he was worn out, exhausted, "all in" and sick. Mr. Harrington saw evidences of his having shoveled dirt. He saw a rock under the running board and saw that "he had evidently tried to build it up to get it back on this boulder." Appellant's own counsel brought out by cross-examination of Tom Heatfield who visited the scene three or four days later that there were indications of his having shoveled 500 to 600 pounds of dirt (Tr. p. 173). He drove two miles to the Forest Ranger Camp and Tom Callan saw him there sick and bent over and trying to vomit. Tom Callan put him to bed and he died during the night. Mrs. Heatfield said that the top shirt he was wearing showed that it had been soaked with perspiration. The references to the transcript of the record of all of the evidence next above set out are in the appellee's statement of the case.

Taking everything into consideration we believe there was enough evidence to justify any jury in arriving at a reasonable inference that Mr. Heatfield had over-exerted himself in trying to get his car back on the road and that the over-exertion was unusual and out of the ordinary.

At the trial Drs. Myhre and Snyder testified that

from their examination of the body and from the foregoing history of the case they believed that Mr. Heatfield died of myocardial insufficiency. It is true that Drs. Lewis and Reid said he died from natural causes, Dr. Lewis declaring of old age, and Dr. Reid of angina pectoris. There was a definite conflict in testimony between the four doctors and the jury found with Drs. Myhre and Snyder.

The next question is whether the court committed error in admitting certain testimony. Objection was made at the trial and later in appellant's brief that Tom Heatfield had not sufficiently identified the spot in the road about which he testified. According to Heatfield's testimony it appears that on July 3 he called at the ranger camp and was directed by one Abrahams where to go. He carefully followed directions until he saw marks of a car having been off the south side of the road. He took some pictures; then drove to Republic, and in doing so must have driven past Harrington's home. He stayed over night at Republic and drove back the next day and again he must have gone by Harrington's home. That day he took some more pictures. A reprint of one of these pictures which was later introduced in evidence was shown to witness Harrington and he testified that it "looked like the place."

Furthermore, Harrington testified that he told Heatfield where the car had been off the road "as near as I could (Tr. pp. 63-64). We are confident that there was no error on the part of the Court in admitting in

evidence a portion of Tom Heatfield's deposition.

Objection was made at the time of the trial to the introduction in evidence of the testimony of Floy Harrington and Tom Callan and appellant, in its brief, argues extensively that the portions of their testimony admitted over objection are not within the *res gestae* rule.

Appellant cites and strongly relies on the case of *Beck v. Dye*, 200 Wash. 1; 92 Pac. (2) 1113. We are in accord with the opinion which quotes six special elements of *res gestae*. It so happens that these six elements are set forth word for word in 32 Corpus Juris (2nd) Evidence, p. 21.

Let us take the six elements seriatim and see how the admitted testimony checks with each of them.

1. The statement or declaration made must relate to the main event and must explain, elucidate or in some way characterize that event.

When Mr. Heatfield told Mrs. Harrington and Mr. Callan that he had worked hard on the car and that he had over-exerted himself, such statements certainly related to the main event. That was in fact the main event in this case. The fact that he had over-exerted himself was the foundation on which plaintiff's case was built.

2. It must be a natural declaration or statement growing out of the event and not a mere narrative of a past completed affair.

Certainly the statements he made to these two witnesses came within that requirement.

3. It must be a statement of fact and not a mere expression of opinion.

We believe the Supreme Court of the State of Washington was entirely correct in deciding the *Field v. North Coast Transportation Company* case, 164 Wash. 123; 2 Pac. (2) 672, cited in appellant's brief as it did. In that case the witness was asked if someone did not criticize him about the way he was driving. That definitely attempted to express a conclusion or an opinion of the unknown party who spoke to the driver. It could not be construed in any other way except as merely the statement of an opinion.

In our case the nearest thing to an opinion is a remark of Heatfield that he had over-exerted himself.

If someone else had said that Heatfield had over-exerted himself that might have been an expression of an opinion or a conclusion of the witness, but when the words came from the lips of Mr. Heatfield, that constituted a statement of fact. Mr. Heatfield had lived with his body for 65 years. He knew, as a fact and not as an opinion whether he had overtaxed his strength and when he said "I over-exerted myself" he knew that to be a fact and he was stating a fact.

We find this very apt expression in the case of *In re Liquor Seized at Auto Inn, Wells v. People*, 197 N. Y. S. 758, at page 760:

“It is a general rule of evidence that a witness or affiant must state facts and not conclusions of facts or opinions. The line between a statement of fact accepted as evidential and a statement of conclusion of fact, insufficient as a matter of evidence, is in many cases shadowy and difficult to define. There are tests, however, which assist in distinguishing the one from the other. Where, in relation to a given statement, it is apparent that there is in the mind of the witness an immediate correspondence between the ideas expressed and the realities observed, the statement of such ideas is an evidential fact of the highest character as the idea is intuitive and represents the reality without conscious reasoning. As observation, however, decreases in value and reasoning increases the statement becomes of less weight evidentially until a point is reached where the statement is rejected entirely as evidential and is branded as a conclusion.”

Applying that test to the instant case we maintain that when Mr. Heatfield said “I over-exerted myself” there was in his mind an immediate correspondence between the idea expressed and the reality which had been observed by him.

There is ample authority that the question of whether evidence shall be admitted under the rule of *res gestae* must be left to the sound discretion of the trial judge and that his judgment will not be reversed except in cases of manifest abuse of discretion.

In the case of *Wm. C. Barry, Inc., v. Baker*, 82 Fed. (2) 79, the first Circuit Court of Appeals says:

“As to whether such declarations should be admitted in a given case, the general and better rule seems to be that it is largely a question to be deter-

mined by the trial court upon consideration of all the circumstances disclosed, including the proximity of the declaration to the occurrence of the accident. * * * It is there said (referring to *Greenleaf*) ‘these surrounding circumstances constituting part of the *res gestae* * * * may always be shown to the jury * * * and their admissibility is determined by the judge according to their relation to that fact and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description.’”

In the case of *Rast v. Mutual Life Ins. Co. of New York*, 112 F. (2) 769, the Court says:

“These cases, both State and Federal, wisely hold that in the admission of testimony of this kind much must be left to the exercise of a sound discretion by the presiding judge.”

In the case of *Wilkins v. Knox*, 142 Wash. 571, 253 Pac. 797, the Supreme Court of Washington said:

“Whether such testimony (opinion) shall be received or excluded is a matter of sound judicial discretion, the exercise of which will not be disturbed by an appellate court except for a very plain abuse thereof, as has been a number of times held by this court in common with the view prevailing generally elsewhere in the United States.”

Even if we admit that there was some element of “conclusion” in the statement of Mr. Heatfield that “I over-exerted myself” there certainly was enough element of fact in that statement to call into play the rule that much must be left to the discretion of the trial judge.

The next two elements we think should be considered

together. Element No. 4 is "it must be a spontaneous or instinctive utterance of thought dominated or evoked by the transaction or occurrence itself and not the product of premeditation, reflection or design."

Element No. 5 is: "While the declaration or statement need not be coincidental or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation."

Appellant has cited many cases in its brief apparently with the thought that the declarations to Mrs. Harrington and to Tom Callan were too remote as to time to have been properly admitted. The Washington case of *MacGarry v. Rodgers*, 144 Wash. 375, 254 Pac. 314, is cited. In that case there was no accident: no personal injury, and no pain and suffering. It was an action to recover damages for alleged breach of contract to support. The evidence showed that plaintiff was ordered from the home of defendants and went two or three miles to a doctor's office and then the doctor was permitted to testify as to plaintiff's recital to him of what had happened at defendant's home. This clearly was not properly admitted under the *res gestae* doctrine.

The case of *Aetna Life Insurance Company v. Kern-Bauer*, 62 Fed. (2) 477, is another case cited by appellant. That was a case on an accident policy and the gist and foundation of the "accidental means" of that case was that assured's car had been run off the road. The evidence showed he left a friend's home at about

5:30 or 6 o'clock p.m. Five hours later he was found in his car off the road 50 miles distant from the friend's house. Two witnesses came along and were permitted to testify that deceased told them that the lights of some car blinded him. That was the only evidence of "accidental means" in the case. The Circuit Court of Appeals of the Tenth Circuit granted a new trial but in so doing the opinion states:

"If both witnesses were testifying to the same statement, and if it was made as soon as they found him, the record is still silent as to how long a time elapsed, or what transpired between the time the lights blinded him and his narration of the event. It may have been 3 minutes or 3 hours. * * * Upon this record he may well have been sitting in his car for hours, * * * reflecting on many things, including an explanation of the accident. The proof leaves the circumstances in the realm of pure speculation."

In the Heatfield case the gist of the case is not what caused the Heatfield car to be off the road. The gist of the Heatfield case is the fact that Mr. Heatfield had over-exerted himself. The evidences of the over-exertion were apparent when Mrs. Harrington and Tom Callan talked with him. Mrs. Harrington was at the very scene where the exertion had occurred. Tom Callan talked with him two miles away about half an hour later and Heatfield was still sick and bent over and part of the time was lying on the ground. The lapse of time for reflection that occurred in the *Aetna Life* case did not occur in the case now under consideration. Furthermore the *Aetna* case was purely and simply a narration of a past event. We are confident

that under all of the facts the *Aetna Life* case is not applicable.

The case of *Chesapeake & Ohio Ry. Co. v. Mears*, 64 F. (2) 291, is cited in appellant's brief. That case goes into the question very thoroughly. The trial court permitted certain statements to go in evidence and the Circuit Court of the Fourth Circuit said the trial court was correct. The opinion quotes from Wigmore on Evidence and from opinions from other jurisdictions and we take the liberty of quoting from the *Mears* opinion. On page 292 the Court says:

"As pointed out by Professor Wigmore, it is not necessary to render such declarations admissible that they be strictly contemporaneous with the occurrence to which they relate. * * * They are admissible, not because they fall without the hearsay rule, as in the case of 'Verbal Acts' but because they fall within an exception to that rule it being considered that there is a sufficient guarantee of the trustworthiness of such declarations to render them admissible, if they are made under the immediate influence of the occurrence to which they relate. The circumstantial guarantee here consists in the consideration * * * that in the stress of nervous excitement the reflective faculties may be stilled and the utterances may become the unreflecting and sincere expression of one's actual impressions and belief."

And again, on page 292, the following quotation:

"Here the principal fact is the bodily injury. The *res gestae* are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. Where sickness or affliction is the subject

of the inquiry the sickness or affliction is the principal fact. The *res gestae* are the declarations tending to show the reality of its existence and its extent and character. The tendency of recent adjudications is to extend rather than to narrow the scope of the doctrine."

And again, on page 293, the following quotation:

"Statements thus made, which are not a narrative of a past transaction but spring naturally and without premeditation from the lips of an injured person in the very pressure of the circumstances which have produced it and while the victim is perhaps writhing in pain are of the highest value in evidence."

And again, on page 293, the following quotation:

"It is not always easy to determine when declarations having relation to an act or transaction should be received as part of the *res gestae* and much difficulty has been experienced in an effort to formulate general rules relative to the subject. This much may, however, be safely said, that declarations which are the natural emanations or outgrowths of the act or occurrence in litigation although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made so nearly contemporaneous as to be in the presence of the transaction which they illustrate or explain and were made under such circumstances as necessarily to exclude the idea of design or deliberation must upon the clearest principles of justice be admissible as part of the act or transaction itself."

Applying these principles to the case at hand let us again briefly review the evidence: Mrs. Harrington found Mr. Heatfield with his car off the road. Her husband had seen that Heatfield had done some work

in an effort to get it back. Heatfield was worn out, exhausted and "all in" and appeared to be suffering. About two miles from that place and within half an hour afterwards Tom Callan saw him when he was doubled over and sick. It cannot be said that the exclamations he made to them were not spontaneous or that they were made after design or deliberation as to the effect the statements would make on his listeners. Heatfield did not know he was going to die or might die. Otherwise he would have taken advantage of Callan's offer to get help. All he knew was that he was sick. He knew why he was sick; he knew that he had over-exerted himself, and as a result of his physical ailment and the nervous excitement under which he was laboring, he told them what caused his sickness and that it was the first time in his life that he had ever been sick that way. The declarations were clearly admissible under Rules IV and V of the doctrine of *res gestae*.

The sixth rule under *res gestae* is that it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration was made.

The Washington case of *Beck v. Dye*, 200 Wash. 1, cited and relied upon by the defendant in its brief was decided on this part of the rule and this part of the rule alone. But palpably there can be no contention that Mr. Heatfield was not a participant in the transaction.

We maintain that the exclamations of pain, suffering, sickness and fatigue and what caused it made to Mrs. Harrington and Mr. Callan were a part of the *res gestae* and that the trial court did not abuse his discretion in admitting them.

About one-half of appellant's brief (8 out of the 19 cases cited) is devoted to defendant's contention that the plaintiff did not give the notice provided in the policy and that the trial court was in error in holding that the letter of July 8 set forth in full on page 25 of appellant's brief was sufficient notice.

The policy provides "written notice of injury on which claim *may* (italics ours) be based must be given to the company within twenty days * * *. Such notice * * * with particulars sufficient to identify the insured, shall be deemed to be notice to the Company."

33 C. J. Vol. 33, page 16 (Insurance) says:

"The object of the notice is to acquaint the company with the occurrence of the loss so that it may make proper identification and take such action as may be necessary to protect its interest."

In the first place it should be remembered that this is an accident policy: not a life policy nor a double indemnity contract. Simply an accident policy providing for payment if death was met by accident. Within 8 days after the accident the beneficiary advised the insurer in writing that assured had died and that "there will probably be a claim made for payment under your accident policy." (The caption of the letter gave the name of the assured and the number of the

policy.) (Tr. pp. 8-9, 77-78). What was the purpose of that letter other than to acquaint the company with the loss under the accident policy and give the company a chance to make proper investigation? Furthermore, what was the company's reaction to this letter? Did it simply consider this as a statement that assured had died and that therefore no further premiums would be paid under the policy? No. As alleged in the complaint and as admitted in the answer, the insurance company had its doctor present at the autopsy which was made on July 10. The letter of July 8 had advised the insurance company when autopsy would be made. Regardless of any other cases which may have been decided on other facts, we simply ask the question: "What did the Standard Accident Insurance Company think when it received the letter of July 8?" The only answer to that question is that the Insurance Company knew that claim "*might*" be made under the accident policy, and the insurance company took advantage of one of the very purposes of the notice, *i.e.*, it was present at the autopsy so that it could determine for itself whether the death of Mr. Heatfield was by "accidental means." This conviction is emphasized by the fact, which appears in the record, that Dr. Peter Reid, the company's doctor who, we allege, and who was admitted to have been present at the autopsy, went before the jury and said that from his examination of the body the deceased died from natural causes and not from "accidental means" (Tr. p. 182-197).

The Supreme Court of the State of Washington held in the case of *McKillips v. Railway Mail Assn.*, 10

Wash. (2) 122; 116 Pac. (2) 330, that

“The matter of chief importance is the requirement that notice of the fact that claim might be presented by a certificate holder should be promptly called to the attention of appellant’s officers.”

It must be remembered that the letter of July 8 was not contemplated to be and was not required to be a “Proof” of death by accidental means as further provided in the policy.

All that is required in the notice is that “written notice of injury on which claim *may* be based must be given the company * * * with particulars sufficient to identify the assured.” The appellant contends, on page 33 of its brief, that the notice did not sufficiently identify the assured. We have no authorities in answer to this contention. Suffice it to say that we know of no way to identify the assured except to give his name and the number of the policy on which the company had been accepting premiums for many years.

The Washington case of *Hanly v. Occidental Life Ins. Co.*, cited in appellant’s brief, is not applicable in favor of appellant. Rather it is in point for the appellee. The case was decided on an entirely different question than the form of the notice. As a matter of fact the Supreme Court of Washington held that the Notice in that case was good. The opinion quotes from the case of *Western Commercial Travelers Assn. v. Smith*, 85 Fed. 401, and the quotation includes the following:

“Forfeitures are not favored in the law, and a strained and unnatural construction must not be given to this contract in order to impose one here.”

The case of *City Bank Farmers Trust Company v. Equitable Life Assurance Co.*, cited in appellant's brief involved the question of “proof” and not “notice.” Likewise the case of *Commercial Casualty Co. v. Stimson*.

The case of *Thompson v. U. S. Casualty Co.*, was one in which the policy required written notice. No written notice was given. All the plaintiff did was to say that “Mr. Thompson died of indigestion.” There was not even a verbal notice that claim might or would probably be made. Nor was an offer made and accepted by the insurance company to be present at any autopsy.

The case of *Wachtel v. Equitable Life Assurance Assn.*, involves “proof” and not “notice.”

The case of *Wilcox v. Massachusetts Protective Assn.*, goes not to the form of the notice but to the question that no notice was given at all until three days after the burial.

The case of *Barnett v. John Hancox Mutual Life Ins. Co.*, goes to the question of “proof” and not “notice.”

There is a decided difference between what is required in a “notice” and what is required in a “proof.” The policy in question provided for both instruments, and nowhere in the policy is there any requirement that the “notice” shall contain anything except a notice that claim may be made and an identification of the assured.

We respectfully maintain that when we wrote our letter of July 8 advising that claim would probably be made and when we gave the insurance company an opportunity to be present at the autopsy and when the insurance company took advantage of our "notice" by having its doctor present at the autopsy to determine whether Mr. Heatfield had or had not died from "accidental means," we gave the insurance company notice and the insurance company accepted notice that claim for accidental death might be made.

CONCLUSION

We respectfully submit: That the complaint stated a cause of action: That "notice" had been given to the Insurance Company: That there was ample evidence to go to the jury even without the objected testimony: That the Court committed no error in admitting the testimony of Mrs. Harrington, Tom Callan and Tom Heatfield: That the Court properly instructed the jury: And that the verdict of the jury and the judgment of the Court should be affirmed.

Respectfully submitted,

HARRY M. MOREY,
1015 Paulsen Building,
Spokane, Washington,
Attorney for Appellee.



IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE STANDARD ACCIDENT INSURANCE
COMPANY, a corporation,

Appellant,

vs.

EDNA L. HEATFIELD, *Appellee.*

No. 10517

*Upon Appeal from the District Court of the United
States for the Eastern District of Washington,
Northern Division.*

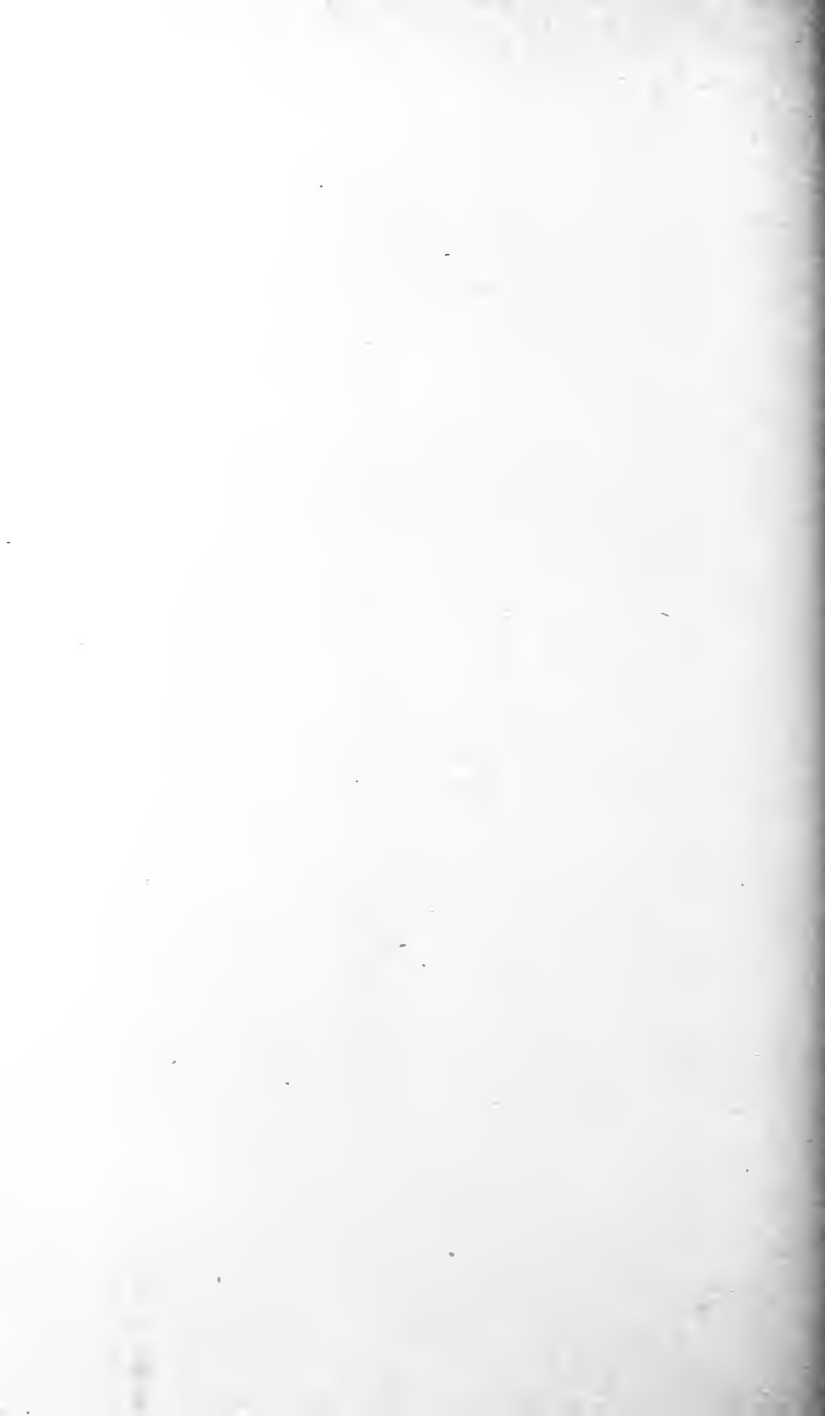
HONORABLE L. B. SCHWELLENBACH,
United States District Judge

APPELLANT'S REPLY BRIEF

M. E. MACK,
832 Old National Bank Bldg.,
Spokane, Washington,
Attorney for Appellant.

FILED

NOV 16 1943



IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE STANDARD ACCIDENT INSURANCE
COMPANY, a corporation,

Appellant,

vs.

EDNA L. HEATFIELD, *Appellee.*

No. 10517

*Upon Appeal from the District Court of the United
States for the Eastern District of Washington,
Northern Division.*

HONORABLE L. B. SCHWELLENBACH,
United States District Judge

APPELLANT'S REPLY BRIEF

M. E. MACK,
832 Old National Bank Bldg.,
Spokane, Washington,
Attorney for Appellant.



R E P L Y

IT MUST BE CONCEDED

1. That the Deceased never talked to only two people.

(a) He said to Floy Harrington:

“I have an awful pain. I have a pain in my heart, the first time in my life I ever had trouble with my heart. It was so hot and he got so tired and exhausted he had to lie down. He had been there an hour. He had tried to back up and tried to go forward, but he couldn’t go either way. His car was stuck there and he tried to get it out and he couldn’t by himself.”

On cross-examination the same witness said Deceased said:

“He had been there two hours. He laid down an hour.” (R. 70-71-72.)

(b) To Thomas A. Callan Deceased said:

“He had overexerted himself.” (R. 109.)

2. It was a very hot day. (R. 72.) He was breathing normally and was not panting or anything. (R. 75.)

3. No one saw him do a thing. (R. 54.)

4. His business was insurance and had been for 26 years. (R. 151.)

5. He operated his own car when he was pulled out of the ditch. (R. 60.)

6. Deceased drove two miles after being pulled out of the ditch before he met and talked to Thomas A. Callan and all he said to him was he overexerted himself. (R. 61.)

7. In every other case there was direct proof of a physical injury. The only question in those cases was, "was it accidental?"

8. The plaintiff's doctors both testified that the autopsy did not disclose that the Deceased overexerted himself. It was necessary to know how much work and labor the man had done. (R. 131, 150.)

9. The man whom Thomas Heatfield, son of deceased, said had informed him where the car was off the road, was Don Abrahams who had never seen the car in the ditch or ever been to the place. (R. 163-164-177.)

10. During the testimony, Thomas Heatfield, the son, exhibits marked by the Notary who took the deposition were *a, b, c, d* being marked at the trial *g, h, l, j* definitely show that they are not even the same side of the road which on examination will readily disclose. (R. 160.)

g shows that the camera was set below the bottom of the picture and shows a straight road ahead;

h shows the camera was set below the bottom of

the picture and shows a decided curve to the right;

i shows that the camera was also set below the picture and shows a decided curve to the left, and that the log is on the right side of the road, while the log in the first picture *g* is definitely on the left side of the road;

j also shows the camera was set below the bottom of the picture and shows a straight road with the curve to the right.

The physical facts by virtue of the pictures show that they could not have been the same picture.

11. Plaintiff endeavors to obviate to avoid the failure to give the notice within the twenty days by pleading in his reply that although "effort had been made by plaintiff to find said policy," it was more than twenty days after the death of said Augustus Heatfield to-wit: on or about August 11, 1942, that the insurance policy was found and placed in her possession and that it was not until said named date that Plaintiff knew the specific provisions of said policy relative to giving notice to the Defendant. In Plaintiff's complaint R-5 is set out e(5) as follows.

With reference to notice as follows:

"Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been rea-

sonably possible to give such notice and that notice was given as soon as was reasonably possible.”

Appellee’s counsel fully realizing the insufficiency of his evidence, unequivocally and willfully mistates the evidence. On page 14 of Appellee’s Brief appears the following:

“When Mr. Heatfield told Mrs. Harrington and Mr. Callan that he had worked hard on the car and that he had overexerted himself, such statements certainly related to the main event.”

There is no statement in the record from the beginning to the end that Mr. Heatfield, the deceased, ever at any place and ever told either of those two parties **THAT HE HAD WORKED HARD ON THE CAR**, and it is the desire of counsel to mislead this court because he recognizes the necessity of the deceased to say that he had done considerable hard work and further because in *Beck vs. Dye*, 200 Wn. 1, the Supreme Court of the State of Washington set out at page 42 of this Brief:

“(1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event.”

Obviously, when the Deceased said he overexerted himself, he was not explaining or elucidating the main event or at all. The same necessity of this elucidation or explaining is set forth in *Jones on Law of Evidence*, Section 360, appearing on page

37 of the Appellant's Brief, and under Section 1754, *Wigmore on Evidence*, Third Edition, under the head of "Declaration Must Elucidate the Act." Page 43 of Appellant's Brief.

In *Yarbrough vs. Prudential Life Insurance Company of America*, 99 Fed. 2nd 874, where the statement is "res gestae must spring from the main fact."

In *Chesapeake and Ohio Railway Company vs. Mears*, 64 Fed. 2nd 291, the Fourth Circuit Court of Appellees said at page 292:

"The res gestae are the statements of the *cause* made by the Assured."

It follows irrevocably that a statement, I overexerted myself was not a statement of the cause, but was a conclusion.

Appelle's counsel, page 11, very definitely states, knowing it to be a fact as follows: "In the Heatfield case no one saw Mr. Heatfield doing any hard manual labor on his car," which is very contradictory of what appears on page 14.

Appellee's counsel entirely overlooks the requirement of notice which is "written notice of injury on which claim may be based must be given to the company within twenty days after the date of the accident causing such injury." (R. 5.)

All Counsel says in Exhibit CR-78, is “assured died near Curlew, Washington, on June 3th.” The notice requires written notice of injury, not of death. In Appellant’s Brief at pages 35 and 36 it appears conclusively: “But notice of death alone is not sufficient. At least the notice must be such as under the existing circumstances, will by fair construction inform the company that the insured has met death, *through accident.*”

Thompson vs. United States Casualty Company, 6 N.E. 2nd 769;

Barnett vs. John Hancock Mutual Life Insurance Co., 126 A.L.R. 608;

City Bank Farmers Trust Co. vs. Equitable Life Assurance Co., 285 N.Y.S. 250;

Wachel vs. Equitable Life Assurance, 194 N.E. 850;

Commercial Casualty Company vs. Stimson, 111 Fed. 2nd 63, at page 68;

Lewis vs. Commercial Casualty Co., 121 Atl. 259. The Court of Appeals of Maryland at Page 261 said, the Provision being as follows:

“Upon the occurrence of the *accident or loss*, the assured shall give immediate written notice *thereof*, with the fullest information obtainable *at the time*.

“The assured by the first provision of the clause was to give immediate written notice of the accident or loss resulting from injury or damage caused by the accident, and in giving that notice he was required to furnish the fullest information obtainable at the time of the accident, not only as to HOW THE ACCIDENT OCCURRED, but also of the injuries from which any loss, covered by the policy, resulted.”

DECEASE STATEMENTS INADMISSIBLE

Flannigan vs. Provident Life and Accident Insurance Company, 22 Fed. 2nd 136.

In this case three quarters of an hour after the claimed accident, Deceased made statement, which the Court stated it would be assumed that there was evidence upon which a jury could have based a finding that he came to his death by reason of the accident. At page 139 Fed. 2nd, it has been held by the Supreme Court of the United States that, to be properly admitted as a part of the *res gestae*, statements should be “necessary incidents of the litigated act * * * and * * * not produced by the calculating policy of the actors.”

“The mere narration of a past occurrence is not a part of the *res gestae* of that occurrence. This is especially true where the person making the statement sought to be proven is an interested party and has had time to think of the effect of his statement. An opinion of this court discusses this point at some length and is in line with the authorities above quoted.”

Abendroth vs. Fidelity & Deposit Co. of Maryland, 124 N.E. 714, at 715, the Appellate Court of Indiana said:

“Upon entering his home on the evening of March 13, 1913, how long after the accident it is impossible to tell, Dr. Abendroth said, ‘I fell,’ and afterwards, ‘I hurt myself,’ and again that he was considerably shaken up. These expressions were offered in evidence, but on objection of appellee they were excluded, and upon this ruling appellant predicates error * * * We hold that such expressions are not expressions of pain, or a part of the *res gestae*. They were merely narrative of past facts, and not admissible.”

The Circuit Court of Appeals, 2nd Circuit, said at Page 484, in 255 Fed. 483, in *Aetna Life Insurance Company of Hartford, Conn. vs. Ryan*:

“It appears that a witness who assisted in picking him up when he fell in the dining room of the Protectors was asked whether he had any conversation with Ryan after he fell. He replied:

“ ‘I was near him all the time. He was mumbling to me and the brothers that he was hit by the subway door, the center door.’

“It was moved to strike out the answer on the ground that it was too remote and not part of the *res gestae*. The objection was overruled * * * The witness did not testify as to any statement made by Ryan as to when he was hit, or where upon his body or other part of him he was hit.

“The evidence was certainly inadmissible as a

part of the *res gestae*. It does not appear when Ryan was hit by the subway door. *The res gestae was* the accident. The declaration made by Ryan was no part of it. It was not made at the time of the accident, and it does not appear that it was so nearly contemporaneous with it as to throw light upon it. *Res gestae* is admissible because and only because it is so connected with the event which it describes that it is a contemporaneous part of and happens with the event."

At Page 487 the same Court said,

"* * * The only testimony in the record that the deceased received any injury whatever is as we have already stated the erroneously admitted testimony that he mumbled that he had been hit by a subway door. And there is no testimony from which the kind and character of the injury, if any, could be inferred."

Galloway vs. United States, 130 Fed. 2nd 467. This Court said at page 471, Judge Garrecht writing the opinion said as follows:

"It is an accepted rule that if the evidence presented by a party is positively contradicted by the physical facts, neither the court nor the jury is permitted to give it credence * * * If the testimony introduced here by the plaintiff were contradicted by the physical facts, the trial judge was bound to direct a verdict for defendant."

Deadrich vs. United States (9 Cir.), 74 Fed. 2nd 619, 622;

Atkins vs. United States, 70 Fed. 2nd 768, 771;

United States vs. Le Duc, 48 Fed. 2nd 789, 783 (8th Cir).

Moyer vs. Aetna Life Insurance Company, 126 Fed. 2nd 141. The C. C. A. of the Third Circuit said at page 144:

“The opinion of an expert can be of no value, when the facts of which the opinion is predicated, are not established * * *.”

First National Bank vs. Wirebach, Ex'r., 106 Pa. 37, 44.

National Labor Relations Board vs. Standard Oil Co. et al, 124 Fed. 2nd 895. The C. C. A. of the Tenth Circuit said at page 903:

“When the evidence is consistent with either of two inconsistent hypotheses it establishes neither.”

Altmayer vs. Travelers Protective Ass'n of America, 119 Fed. 2nd 1005. The C. C. A. of the Seventh Circuit at page 1008 said:

“* * * Circumstances shown by his evidence are consistent with a theory that insured's condition, which appears to have developed from that time forward was caused by bodily infirmity and inconsistent with any theory of accidental injury. To conclude that he suffered a violent injury on April 20 is pure speculation and without substantial support in the evidence.”

Esser & Co. vs. Industrial Commission, 211 N. W. 150;

Brown vs. Maryland Casualty Co., 8 Cir., 55 F. 2d 159;

Jones vs. Mutual Life Ins. Co. of New York, 113 Fed. 2, 873.

WAIVER OR ESTOPPEL MUST BE PLEAD

Distributors Packing Co. vs. Pacific Indemnity Co.,
70 Pac. 2, 253, District Court of Appeal of California
said at page 255:

“The second question is not properly presented for our consideration, for the reason that the law is settled that, where the plaintiff relies on a waiver of a breach of conditions of an insurance policy, such waiver must be alleged and evidence of the waiver is not admissible under an allegation of performance of the conditions of the contract.”

Purefoy vs. Pac. Auto Indemn. Exch., 53 P.
(2d) 155;

McDaniels vs. General Ins. Co., 36 Pac. 2,
829;

Cohen vs. Metropolitan Life Ins. Co., 89 Pac.
2, 732;

Malloy vs. Head, Admr., 123 A.L.R. 941;

*L. Black vs. London Guarantee & Accident
Co.*, 128 N. E. 24.

INSURED OR BENEFICIARY WILL NOT BE EXCUSED FROM GIVING NOTICE UNLESS MENTAL OR PHYSICAL CONDITION REN- DERS IT IMPOSSIBLE

*Long vs. Monarch Accident Ins. Co. of Springfield,
Mass.*, 30 Fed. 2nd, 929, on page 932 the Fourth
Circuit said:

“It is true that in spite of such provisions as are contained in the policy, the law will favor the insured in exceptional cases, but he will never be completely excused from giving notice unless his mental or physical condition is actually such as to render notice impossible. The burden of proving compliance with the provisions of the policy is upon the insured or the beneficiary.”

Malloy vs. Head, Adm., 123 A.L.R. 941, at 945 the Supreme Court of New Hampshire said:

“Their failure to read or having read to remember the condition is not such accident, mistake or misfortune as would relieve them from its operation.”

The Provision with reference to notice appearing in *Malloy vs. Head, Admr.*, 123 A.L.R. 941 at 944, appears as follows:

“D. In the event of accident written notice shall be given by or on behalf of the Assured to the Company or any of its authorized agents as soon as is reasonably possible.”

In interpreting this notice the Court said at 945:

“Beyond that, it was clearly the intent of the contract that there should be separate notices in case of accident, claim and suit. * * * it depended solely upon the plaintiffs’ knowledge of the happening of the accident.”

Johnson vs. Casualty Co., 60 A. 1009.

In the above case the Court said:

“The only excuse offered for noncompliance

with the condition of the policy is that the plaintiff's failure to do so was the result of accident, mistake and misfortune."

Smith and Dove Manufacturing Company vs. Travelers Insurance Company, 50 N. E. 516:

"But his intention to send notice was interrupted by the strike which gave him a great deal of trouble. The result was that he forgot the notice or assumed it had been sent. We are of the opinion that they show neither a compliance with the condition nor an excuse for not complying with it. But such is not a compliance with the condition without which there can be no recovery at common law."

Deer Trail Consolidated Mining Company vs. Maryland Casualty Company, 36 Wn. 46:

"Johnson, an employee of plaintiff, was injured. Yarwood was plaintiff's manager. Johnson did not give the defendant notice and the plaintiff had no notice of the accident. Its manager knew nothing of the policy."

The Court at page 52 said:

"This condition of affairs was brought about solely by the neglect of the insured to notify the others of the contract and, as a matter of fact, is no excuse for failure to notify the appellant of the *accident* according to the terms of the policy."

NOTICE OF ACCIDENT NECESSARY

Korrels vs. National Accident Society, 116 N. W. 1046, the Supreme Court of Iowa at page 1047 said:

“The notice addressed to the defendant advised them that her husband was killed while crossing or getting ready to cross a railroad track.”

The Court further said:

“The notice is no part of the proof, but is intended to advise the insurer that an *accident* has happened, because of which a claim will be made under the policy, to the end that the insured may prosecute inquiry into the fact of the *accident* and the circumstances thereof.”

Wick vs. The Western Life & Casualty Co.,
199 Pac. 272.

Allman vs. Order of United Commercial Travelers of America, 213 S. W. 429, the Supreme Court of Missouri said at page 432:

“A formal demand for an autopsy was subsequently made. It was a demand appellant had a right to make, in proper circumstances in furtherance of its preparation for trial * * * Appellant had the right to prepare for trial on all defenses. The action had been begun. There is no claim anything was said or written or done in connection with this demand which implied a waiver of anything, or that respondent took any action of any kind as a result of this demand except that her attorney rejected it.”

Respectfully submitted,

M. E. MACK,

832 Old National Bank Bldg.,
Spokane, Washington,
Attorney for Appellant.

4 THE STANDARD ACCIDENT INSURANCE)
5 COMPANY, a corporation,

No. 10517

6 Appellant,)

APPELLEE'S SUPPLEMENT
LIST OF AUTHORITIES

7 vs.

8 EDNA L. HEATFIELD,

9 Appellee.)

10 To be added to Joint IV of Summary of Argument,
11 6 of Appellee's Brief:

12 National Life & Accident Insurance Company v.
13 Wedges, (Ky.) 27 . . (2) 422;

14 Travelers Insurance Company of Chic. & v. Wolfe
15 1) L. d. 427;

16 Devlin v. Department of Labor Industries (Wn.
17 7) Pac. (2) 452.

18 To be added to Joint VI of Summary of Argument,

19 7 of Appellee's Brief:

20 National Life & Accident Insurance Company
21 v. Wedges, (Ky.) 27 . . (2) 422.

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Harry M. Moore

Attorney for Appellee
1015 Madison Building
Washington

Copy received this 21st
day of December, 1940.

Attorney for Appellant.

IN THE UNITED STATES DISTRICT COURT OF APPEALS
FOR THE FIRST CIRCUIT

7 STANHOPE HOLDINGS II, LIMITED
0 PANY, a corporation,

Appellant,

o. 10517

vs.

STANHOPE HOLDINGS II, LIMITED
LIMITED PARTNERSHIP.

et al.

Appellees and Intervenor-Appellees.

AN ORDER OF THE COURT is hereby made that the following
cases be heard by the court as stated above.

STANHOPE HOLDINGS II, LIMITED
vs. STANHOPE HOLDINGS II, LIMITED
LIMITED PARTNERSHIP.

STANHOPE HOLDINGS II, LIMITED
vs. STANHOPE HOLDINGS II, LIMITED
LIMITED PARTNERSHIP.

It is ordered that the cases be heard by the court as stated above.

Henry M. Henry

1000 F. 2d 1000 - 10517
No. 10517, 10518, 10519.

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PAUL P. O'BRIEN,
CLERK

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 10 1943

THE STANDARD ACCIDENT INSURANCE
COMPANY, a corporation,

NO. 10517

PAUL H. BRIEN,
Clerk

vs.

Appellant,

EDNA L. HEATFIELD,

SUPPLEMENTAL PRIMER

Appellee.

Before the res gestae rule comes into being there must be evidence of an accident.

United States Fidelity & Guaranty Co. v. Plum, 270 Federal 946. This circuit said at page 952: "It goes without saying that, in order for plaintiff to recover, there must be evidence that an accident occurred conducing to the injury."

Collins v. Equitable Life Insurance Company, 130 A.L.R.297.

The Supreme Court of West Virginia, at page 290, said: "When a statement is wholly detached from the act it would explain, it is not admissible under either the verbal act or the res gestae doctrine; but when appearances indicate that one has suffered an injury, a statement by him, if spontaneous and reasonably coincident with, and explanatory of, the occurrence, may be regarded as a part of it, and be competent evidence under the res gestae doctrine."

"Precedent's statement at the store was not made until approximately an hour after the accident. The interval of time which had elapsed and the circumstances under which that statement was made rendered it narrative and its admission erroneous."

Tillotson v. Travelers' Insurance Company, No. 263 S.W. 219.

At page 635 the Supreme Court of Missouri said: "To constitute proof of accidental death by drowning, as alleged in the petition, there must be substantial evidence that Tillotson accidentally fell into the water and was drowned, or that he was murderously assaulted and thrown into the river by his assailants and drowned."


Attorney for Appellant.

Service acknowledged by receipt
of copy this _____ day of
December, 1943.

Attorney for Appellee

No. 10519

United States
Circuit Court of Appeals
For the Ninth Circuit.

NATHANIEL WINSTON HENDERSON,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

DEC 29 1943

PAUL P. O'BRIEN,
CLERK

No. 10519

United States
Circuit Court of Appeals
For the Ninth Circuit.

NATHANIEL WINSTON HENDERSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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No. 16044

United States District Court, Southern District of
California, Central Division

THE UNITED STATES OF AMERICA

vs.

N. WINSTON HENDERSON

INDICTMENT

Viol.: 18 USC 100—Theft of Government Property.

In the Name and by the Authority of the United States of America, the Grand Jury for the Southern District of California, at Los Angeles, presents on oath in open Court:

That

N. WINSTON HENDERSON,

hereinafter called the defendant, on or about June 2, 1943, at Los Angeles, Los Angeles County, California, was a duly appointed, qualified and acting Chairman of War Price and Rationing Board No. 5-48, said board being then and there a War Price and Rationing Board set up by the Office of Price Administration, an agency of the United States;

That on or about the said 2nd day of June, 1943, at Los Angeles, Los Angeles County, California, aforesaid, the defendant did knowingly, wilfully, unlawfully and feloniously embezzle certain property of the United States, to-wit: 250 "A" gasoline rationing coupons, a more particular description of

which said property is to the grand jurors unknown, and which said property had on said date come into the possession of said defendant in the regular course of his official duty as said Chairman of said War Price and Rationing Board as aforesaid, said defendant then and there well knowing said property to be property of the United States;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [2]

COUNT TWO

And the Grand Jury aforesaid, upon their oath aforesaid, do further present:

That

N. WINSTON HENDERSON,

hereinafter called the defendant, on or about June 2, 1943, at Los Angeles, Los Angeles County, California, did knowingly, wilfully, unlawfully and feloniously steal and purloin certain property of the United States, to-wit: 250 "A" gasoline rationing coupons, a more particular description of which said property is to the grand jurors unknown; the said defendant then and there well knowing said property to be the property of the United States;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

CHARLES H. CARR

United States Attorney

A true bill,

D. BLAINE MORGAN
Foreman.

Bail, \$3000.

[Endorsed]: Filed June 9, 1943. [3]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 21st day of June in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable: Campbell E. Beaumont, District Judge.

No. 16,044—Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

N. WINSTON HENDERSON,

Defendant.

PLEA OF NOT GUILTY

This cause coming on for arraignment and plea of the defendant N. Winston Henderson; Rollin F. Duni, Esq., Assistant U. S. Attorney, appearing for the Government; Ezra E. Stern, Esq., appearing as counsel for the defendant; Wm. Herrick, Court Re-

porter, being present and reporting the proceedings; the defendant, being present in Court on bond, now states his true name to be Nathaniel Winston Henderson, waives the reading of the Indictment, and enters plea of not guilty to both counts of the Indictment.

It is ordered that this cause be, and it hereby is, set for trial for July 13, 1943, at 10 A. M. before a Jury, and that a Jury be ordered for the trial of this case.

34/134 [5]

[Title of District Court and Cause.]

PETITION TO SUPPRESS EVIDENCE AND
TO DIRECT THE RETURN THEREOF TO
THE DEFENDANT

Comes now, N. Winston Henderson, defendant herein, and respectfully represents:

I.

That heretofore, and on or about June 2, 1943, at about the hour of 10:00 o'clock a. m., on West Adams Boulevard, at a point about 100 feet easterly of Kenwood Avenue, in Los Angeles, California, he was unlawfully and illegally arrested by one Jack Foster and two other persons, whose names are to petitioner unknown, but all of whom represented themselves to be investigators for the Office of Price Administration, and employed by the United States Government, and said three last named persons

against the will, wishes, and consent, and over the protest, and in violation of the constitutional rights of petitioner as secured to him under the Fourth and Fifth Amendments to the Constitution of the United States, searched petitioner and his Cadillac automobile, bearing [6] California License No. 01A-574, and as the result of such search seized and kept in their possession \$30.00 in United States currency belonging to petitioner, which said sum of \$30.00 is still retained by the three persons named.

II.

That at the time of the arrest of the petitioner, no warrant of arrest was exhibited to, or read to petitioner, nor was any search warrant exhibited to petitioner, nor was any statement made by the said Foster and the other persons with him, that the search of petitioner's person or of his automobile was being made under authority of any search warrant, nor was any crime, either felony or misdemeanor, either as charged in the indictment, or otherwise, or at all, committed by petitioner in the presence of the said Foster or the other persons with him at the time of such search and seizure.

III.

That as the said Foster and the other persons with him approached petitioner, the said Foster stated: "What are you fellows doing here; we are going to look you over"; and thereupon the said Foster exhibited to petitioner his, Foster's, official identification card, and thrust his hand into the left

side trouser pocket of petitioner and extracted therefrom the \$30.00 in currency above-mentioned, and one of the other men with the said Foster reached into the pocket of one Murray, who was at that time in the Cadillac automobile of petitioner and extracted something from the said Murray's pocket; that thereafter, and at no time prior thereto, the said Foster stated: "We are going to take you along," and no statement or suggestion was theretofore made by the said Foster or by either of those men with him that petitioner was under arrest.

IV.

That the said search above-mentioned occurred opposite [7] No. 1642 West Adams Boulevard, Los Angeles, California, which property petitioner now owns and has owned continuously for more than six years last past, and which consists of a two-story store and apartment building, and to which property petitioner makes frequent trips and not less often than an average of ten times a month; that petitioner now resides, and for more than one year last past has resided, with his family at his property at 5502 Rimpau Boulevard, Los Angeles, California; that ever since the establishment in Los Angeles of War Price and Rationing Boards, petitioner has been a member of Board No. 5-48, and for more than one year prior to, and up to the date of the search above mentioned, petitioner has been Chairman of such Board, he having served on that Board almost daily.

Wherefore, petitioner prays that the property so seized be excluded as offered in evidence at the trial of this cause, and that such property be suppressed and the whole thereof be forthwith returned to the petitioner, or to his order.

N. WINSTON HENDERSON

Defendant and Petitioner

AMES PETERSON and

DAVID H. CANNON

By DAVID H. CANNON

Attorneys for Defendant

and Petitioner. [8]

I, David H. Cannon, one of the attorneys for the defendant herein, do hereby certify that the above and foregoing Petition to Suppress Evidence, etc., is made in good faith, and not for the purpose of delay, and, in my opinion, is well taken in law.

Dated: July 7, 1943.

DAVID H. CANNON [9]

State of California

County of Los Angeles—ss

H. Winston Henderson, being by me first duly sworn deposes and says: That he is the Defendant and Petitioner in the above entitled matter; that he has read the foregoing Petition to Suppress Evidence and to Direct the Return Thereof to the Defendant and knows the contents thereof; and that the same is true of his own knowledge except as to the matters and things therein stated on his infor-

mation or belief, and that as to those matters and things he believes to be true.

H. WINSTON HENDERSON

Subscribed and Sworn to before me this 8th day of July 1943.

[Seal]

DOROTHY BUTLER

Notary Public in and for the County of Los Angeles
State of California [10]

POINTS AND AUTHORITIES IN SUPPORT
OF MOTION TO SUPPRESS EVIDENCE
AND TO DIRECT THE RETURN THERE-
OF TO THE DEFENDANT

Evidence of any character secured in violation of the Fourth and Fifth Amendments to the Constitution of the United States cannot be used over the objection of the defendant; it is the duty of the Court to suppress such evidence and to direct the return of the seized property to the person or persons from whom it was taken.

United States vs. Abrams,
230 Fed. 313;

Agnello vs. United States,
269 U.S. 20;
70 L. Ed. 145;

United States vs. Wong,
94 Fed. 832;

Weeks vs. United States,
232 U.S. 383;
58 L. Ed. 652;

Boyd vs. United States,
116 U.S. 616;
29 L. Ed. 746.

The compulsory seizing of this money from the person of the defendant "may be likened to a confession, which is incompetent because not voluntarily made."

United States vs. Abrams, *supra*.

Bram vs. United States,
168 U.S. 532;
42 L. Ed. 568.

[Endorsed]: Filed July 8, 1943. [11]

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 13th day of July in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable: Campbell E. Beaumont, District Judge.

[Title of Cause.]

No. 16,044-B Crim.

This cause coming on for jury trial; Maurice Norcop, Esq., Assistant U. S. Attorney, appearing for the Government; Ames Peterson and David H. Cannon, Esqs., appearing as counsel for the defend-

ant; A. H. Bargion and Samuel Goldstein, Court Reporters, being present and reporting the proceedings; the defendant being present in Court:

It is ordered that the motion of defendant to suppress evidence, etc., heretofore heard, is denied and exception noted.

Both sides being ready, it is now ordered that a jury be impaneled for the trial of this cause, whereupon the Clerk draws the names of the following twelve jurors, who take their seats in the jury box:

1. J. A. Masterson
2. D. C. Wright
3. F. H. Bartlett
4. Omar E. Boyd
5. Herman R. Brier
6. Alan H. De La Mare
7. Fred J. Brown
8. Ralph G. Johns
9. Ben Cottle
10. Thos. A. Gould
11. W. A. Burke
12. R. B. Dickinson

The jurors are examined for cause, and Fred J. Brown is excused for cause; it is ordered that one more name be drawn, and the name of Raymond Zens is drawn; examined for cause and passed for cause.

The jurors now in the box are passed for cause, and F. H. Bartlett is excused by defendant on peremptory challenge; it is ordered that one more

name be drawn, and the name of Herbert H. Culling is drawn; examined for cause and passed for cause.

W. A. Burke is excused by plaintiff on peremptory challenge; it is ordered that one more name be drawn, and the name of Edward M. Clogg is drawn; examined for cause and excused for cause. It is ordered that one more name be drawn, and the name of Walter B. Brown is drawn; examined for cause and passed for cause. [12]

Walter B. Brown is excused by defendant on peremptory challenge; it is ordered that one more name be drawn, and the name of Ralph O. Chick is drawn; examined for cause and passed for cause.

R. B. Dickinson is excused by defendant on peremptory challenge; it is ordered that one more name be drawn, and the name of Harry Wine is drawn; examined for cause and passed for cause.

Harry Wine is excused by plaintiff on peremptory challenge; it is ordered that one more name be drawn, and the name of Joseph A. Conaty is drawn; examined for cause and passed for cause.

Herbert H. Culling is excused by defendant on peremptory challenge; it is ordered that one more name be drawn, and the name of Nelson W. Cowles is drawn; examined for cause and passed for cause.

Ralph G. Johns is excused by defendant on peremptory challenge; it is ordered that one more name be drawn, and the name of Julius Wohl is drawn; examined for cause and passed for cause.

Julius Wohl is excused by plaintiff on peremptory challenge; it is ordered that one more name be

drawn, and the name of Jefferson W. Asher is drawn; examined for cause and passed for cause.

Herman R. Brier is excused by defendant on peremptory challenge; it is ordered that one more name be drawn, and the name of G. T. Edmondson is drawn; examined for cause and passed for cause.

G. T. Edmondson is excused by defendant on peremptory challenge; it is ordered that one more name be drawn, and the name of Albert F. Bolz is drawn; examined for cause and passed for cause.

At 11 o'clock A. M. the Court admonishes the jurors that during the progress of this trial and the recesses therein, they are not to speak to anyone, or permit anyone to speak to them about this cause or any matter or thing therewith connected; that until said cause is finally submitted to them for their deliberation under the instructions of the Court, they are not to speak to each other about this cause or any matter or thing therewith connected, or form or express any opinion concerning the merits of the trial until it is finally submitted to them, and declares a recess. [13]

Court reconvenes herein at 11:25 A. M.; all present as before; the jurors in the box and the defendant are present; it is ordered that this cause be, and it hereby is, continued to 3 P. M.; the jurors are reminded of the admonition heretofore given, and Court recesses at 11:35 A. M.

Court reconvenes at 3 P. M.; all present as before; the jurors in the box and the defendant are present.

Jefferson W. Asher is excused by plaintiff on peremptory challenge; it is ordered that one more name be drawn, and the name of Edward McWilliams is drawn; examined for cause and passed for cause.

Albert F. Bolz is excused by defendant on peremptory challenge; it is ordered that one more name be drawn, and the name of James Loudon is drawn; examined for cause and passed for cause.

James Loudon is excused by defendant on peremptory challenge; is is ordered that one more name be drawn, and the name of H. J. Stevenson is drawn; examined for cause and passed for cause.

There being no further challenges, the jurors now in the box are accepted and sworn as the jury for the trial of this cause, viz:

THE JURY

1. J. A. Masterson
2. D. C. Wright
3. Nelson W. Cowles
4. Omar E. Boyd
5. H. J. Stevenson
6. Alan H. DeLaMare
7. Raymond Zens
8. Edw. McWilliams
9. Ben Cottle
10. Thos. A. Gould
11. Ralph O. Chick
12. Joseph A. Conaty

The remaining jurors not impaneled are excused to July 16, 1943, at 10 A. M.

The Clerk reads the indictment to the jury.

At 3:40 P. M. the Court reminds the jury of the admonition heretofore given, and declares a recess.

Court reconvenes at 3:55 P. M.; all present as before; the defendant and jury are present, and counsel so stipulate.

Attorney Peterson moves for exclusion of witnesses, and it is so ordered as to all witnesses except John E. Foster.

Witnesses R. W. Smith, J. P. Murray, Marie A. Stabler, J. H. Taylor, John E. Foster, Fred E. Yerger, and Grace S. Kingon, are sworn, and said witnesses leave the Courtroom except John E. Foster and Grace S. Kingon. [14]

Grace S. Kingon is called and testifies for the Government.

Government's Exhibit No. 1 is received in evidence, and Government's Exhibit No. 2 is marked for identification.

At 4:50 P. M. the Court reminds the jury of the admonition heretofore given, and orders the further trial of this cause continued to July 14, 1943, at 9:30 A. M., and Court adjourns.

34/468-471 [14-A]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 14th day of July in the

year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Campbell E. Beaumont,
District Judge.

[Title of Cause.]

No. 16,044-B Crim.

This cause coming on for further jury trial; Maurice Norcop, Esq., Assistant U. S. Attorney, appearing for the Government; Ames Peterson and David H. Cannon, Esqs., appearing as counsel for defendant; A. H. Bargion and Samuel Goldstein, Court Reporters, being present and reporting the proceedings; the jury and defendant are present, and it is so stipulated.

Grace S. Kingon continues testimony.

Fred E. Yerger, heretofore sworn, testifies for the Government.

Government's Exhibits Nos. 3, 5 and 6 are received in evidence, and No. 4 is marked for Identification.

Government's Exhibits Nos. 2 and 4, heretofore marked for Identification, are received in evidence.

Defendant's Exhibit A is received in evidence.

At 10:30 A. M. the Court reminds the jury of the admonition heretofore given, and declares a recess; reconvenes at 10:45 A. M.; all present as before, including the defendant, and the jury is absent.

Counsel argue re admissibility of evidence.

At 11:10 A. M. the jury returns into Court; all

present as before; the defendant and jury are present, and counsel so stipulate.

James P. Murray, heretofore sworn, testifies for the Government.

Government's Exhibit No. 7 is marked for Identification.

Government's Exhibit No. 8 is received in evidence.

At 12 o'clock noon the Court reminds the jury of the admonition heretofore given, and recesses to 2 P. M.

Court reconvenes at 2 P. M.; all present as before; the defendant and jury are present, and counsel so stipulate. [15]

James P. Murray continues testimony.

Government's Exhibits Nos. 9, 10 and 11, and Defendant's Exhibit B are received in evidence.

Orville Lloyd Sargent is called, sworn, and testifies for the Government.

At 3 P. M. the Court reminds the jury of the admonition heretofore given, and declares a recess; reconvenes herein at 3:40 P. M.; all present as before; the defendant and jury are present, and counsel so stipulate.

Witness Sargent continues testimony.

At 3:45 P. M. the Court reminds the jury of the admonition heretofore given, and excuses the jury and they retire, and in the absence of the jury counsel argue re admissibility of testimony, and the Court strikes certain testimony of the witness Sargent.

At 4 P. M. the jury returns into Court; all pres-

ent as before; the defendant and jury are present, and counsel so stipulate.

Witness Sargent continues testimony.

Marshall E. McFarland is called, sworn, and testifies for the Government.

Government's Exhibit No. 12 is marked for Identification, and No. 13 is received in evidence.

Richard W. Smith is called, sworn, and testifies for the Government.

Jona H. Taylor is called, sworn, and testifies for the Government.

Government's Exhibit No. 14 is received in evidence.

At 5 P. M. the Court reminds the jury of the admonition heretofore given, and orders the further trial of this cause continued to 10 A. M. July 15, 1943.

34/498-499 [16]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 15th day of July in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable: Campbell E. Beaumont,
District Judge.

[Title of Cause.]

No. 16,044-B Crim.

This cause coming on for further jury trial; Maurice Norcop, Esq., Assistant U. S. Attorney, appearing for the Government; Ames Peterson and David H. Cannon, Esqs., appearing as counsel for the defendant; F. M. Harvey and Samuel Goldstein, Court Reporters, being present and reporting the proceedings; the defendant and jury are present, and counsel so stipulate.

John E. Foster, heretofore sworn, testifies for the Government.

Government's Exhibit No. 15 is received in evidence.

Defendant's Exhibit C is marked for Identification, and Defendant's Exhibits D and E are received in evidence.

At 11:05 A. M. the Court reminds the jury of the admonition heretofore given, and declares a recess; reconvenes at 11:20 A. M.; all present as before; the defendant and jury are present, and counsel so stipulate.

Witness Foster continues testimony.

Defendant's Exhibits F and C, and Government's Exhibit No. 16, are received in evidence.

Minnie Smith is called, sworn, and testifies for the Government.

At 12 o'clock noon the Court reminds the jury of the admonition heretofore given, and declares a recess to 1:30 P. M.

Court reconvenes at 1:35 P. M.; all present as before; the defendant and jury are present, and counsel so stipulate.

The Court excuses the jury and they retire.

In the absence of the jury, counsel argue re admissibility of certain evidence.

Court recesses at 2:40 P. M. and reconvenes at 2:50 P. M.; all [17] present as before; the defendants and jury are present, and counsel so stipulate.

The Government rests.

Attorney Cannon moves for suppression of Government's Exhibit No. 9 and moves for directed verdict of not guilty on both counts of the indictment. The Court denies said motions.

Murray Armstrong is called, sworn, and testifies for defendant.

Sidney Redpath, Kenneth A. MacIntyre, Robert I. Stillwell, and Edward F. Herzog are called, sworn, and testify for defendant.

Both sides rest.

Attorney Peterson renews motion for directed verdict of not guilty on both counts, and the Court denies the motion.

At 3:05 P. M. Attorney Norcop argues to the jury on behalf of the Government.

At 3:25 P. M. the Court reminds the jury of the admonition heretofore given, and orders this cause continued to July 16, 1943, at 9:30 A. M. for further trial.

34/516-518 [18]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Di-

vision of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 16th day of July in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable: Campbell E. Beaumont,
District Judge.

[Title of Cause.]

No. 16,044-B Crim.

This cause coming on for further jury trial; Maurice Norcop, Esq., Assistant U. S. Attorney, appearing for the Government; Ames Peterson and David H. Cannon, Esqs., appearing as counsel for the defendant; F. M. Harvey, Court Reporter, being present and reporting the proceedings; the defendant and jury are present, and counsel so stipulate; it is ordered that trial proceed.

Attorney Norcop moves to dismiss count 2 of the indictment, and Attorneys Cannon and Peterson consent thereto, and count 2 is ordered dismissed.

Attorney Peterson argues to the jury on behalf of the defendant at 9:37 A. M.

Attorney Cannon argues to the jury on behalf of the defendant at 9:48 A. M.

Attorney Norcop argues to the jury on behalf of the Government in closing.

At 10:35 A. M. the jury is reminded by the Court of its admonition heretofore given, and the Court declares a recess.

At 10:55 A. M. Court reconvenes; all present as before; the defendant and jury are present, and counsel so stipulate.

The Court instructs the jury on the law of the case.

Attorney Cannon excepts to jury instructions given and not given.

G. C. Welch and Wendell Davis, bailiffs, are sworn as the officers to care for the jury.

At 11:15 A. M. the jury is given form of verdict and retires to consider its verdict, and the Court recesses to await the return of the jury. [19]

Court reconvenes at 12:20 P. M.; all present as before; the defendant and jury are present, and counsel so stipulate.

In response to the Court's inquiry, the foreman states that the jury has agreed upon a verdict; whereupon, pursuant to the Court's order, the verdict is presented and read by the Clerk. The jury is polled, and each juror states that verdict of guilty is his verdict; whereupon, the verdict is ordered filed and entered, said verdict being as follows:

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above entitled case, find the defendant Nathaniel Winston Henderson, Guilty as charged in the first count of the indictment.

Dated: Los Angeles, California, July 16, 1943.

O. E. BOYD,

Foreman of the Jury.

[Endorsed]: Filed Jul. 16, 1943. Edmund L. Smith, Clerk. By R. B. Clifton, Deputy Clerk.

The jury is ordered discharged from the case and excused until notified.

It is further ordered that this cause be, and it hereby is, continued to July 24, 1943, at 10 A. M. for sentence.

Attorney Peterson moves that the defendant be continued on present bond until time of sentence; Attorney Norcop consents thereto, and it is so ordered.

Court adjourns at 12:35 P. M.

34/533-535 [20]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 6th day of August, in the year of our Lord one thousand nine hundred and forty-three.

Present the Honorable Campbell E. Beaumont District Judge.

[Title of Cause.]

No. 16,044-B Crim.

REPORT OF PROBATION OFFICER

This cause coming on for hearing on report of the Probation Officer and sentence of the defendant Nathaniel Winston Henderson on count 1 of the indictment herein; Maurice Norcop, Esq., Assistant U. S. Attorney, appearing for the Govern-

ment; Ames Peterson and David H. Cannon, Esqs., appearing as counsel for the defendant; Ross Reynolds, Court Reporter, being present and reporting the proceedings; the defendant being present in Court on bond.

Attorney Peterson states there is no legal cause why sentence should not be pronounced at this time, and argues for leniency.

The Court pronounces judgment against the defendant as follows:

* * * * *

Attorney Peterson moves the Court to fix bond on appeal and argues. The Court fixes bond on appeal at \$10,000.00 and orders defendant remanded to custody.

34/881-883 [21]

District Court of the United States
Southern District of California, Central Division
UNITED STATES

v.

NATHANIEL WINSTON HENDERSON

No. 16044 Criminal Indictment in two counts
for violation of U.S.C. Title 18 Secs. 100

JUDGMENT AND COMMITMENT

On this 6th day of August, 1943, came the United States Attorney, and the defendant Nathan-

iel Winston Henderson appearing in proper person, and by Amos Peterson and David H. Cannon, Esqs., his attorneys, and

The defendant having been convicted on jury verdict of guilty on count 1 of the offenses charged in the indictment in the above-entitled cause, to wit: embezzlement of government property

and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) C. E. BEAUMONT,
United States District Judge.

[Endorsed]: Filed Aug. 6, 1943. [22]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The name and address of appellant is N. Wins-

ton Henderson, 5502 Rimpau Boulevard, Los Angeles, California.

The names and addresses of appellant's attorneys are,—Ames Peterson, Esq., 639 South Spring Street, Los Angeles—14, California, and David H. Cannon, Esq., 650 South Spring Street, Los Angeles—14, California.

The offense was a violation of 18 U.S.C. 100— theft of government property.

The date of judgment was August 6, 1943. A brief description of the judgment is 5 years in the Federal Penitentiary. Appellant is now on bail.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeal for the Ninth Circuit [23] from the judgment above mentioned on the grounds set forth below.

N. WINSTON HENDERSON
Appellant

Dated: Aug. 6, 1943.

GROUND OF APPEAL

I.

That said verdict and finding of guilt is contrary to the evidence adduced at the trial of said cause.

II.

That the evidence adduced at the trial is insufficient to justify said verdict and finding of guilt.

III.

Errors of the Court in admission of testimony

offered by the United States of America in evidence against this defendant.

IV.

That the trial judge erred in his rulings on the questions of law and fact.

V.

That the court erred in admitting into evidence and permitting to be considered by the jury evidence tending to show the commission of offenses other than those set forth in the indictment upon which the defendant was tried.

AMES PETERSON

DAVID H. CANNON

Attorneys for Appellant.

[Endorsed]: Filed Aug. 6, 1943. [24]

[Title of District Court and Cause.]

BAIL BOND ON APPEAL.

Bond No. 824-0015

Know All Men By These Presents:

That we, N. Winston Henderson as Principal, and the Northwest Casualty Company, a Washington Corporation, a surety, are jointly and severally held firmly bound unto the United States of America in the sum of Ten Thousand (\$10,000.00) Dollars, for the payment of which sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to-wit, on the 6th day of August, 1943, at a term of the District Court of the United States, in and for the Southern District of California, Central Division, in an action pending in said Court in which the United States of America is Plaintiff, and N. Winston Henderson was Defendant, judgment and sentence were made, given, rendered and entered against the said Defendant in the above-entitled action, whereas he was convicted as charged in the indictment;

Whereas, in said judgment and sentence, so made, given, rendered and entered against said N. Winston Henderson, it was ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the Penitentiary Type, to be designated by the Attorney General or his Authorized representative for a period of Five years.

Whereas, the said N. Winston Henderson, has filed notice of appeal from the said conviction and from the said judgment and sentence appealing to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the said N. Winston Henderson, has been [25] admitted to bail pending the decision upon said appeal, in the sum of Ten Thousand (\$10,000.00) Dollars.

Now Therefore, the conditions of this obligation are such that if said N. Winston Henderson shall

appear in person, or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his appeal; and if the said N. Winston Henderson shall abide by and obey Court orders by the said United States Circuit Court of Appeals for the Ninth Circuit, and if the said N. Winston Henderson shall surrender himself in execution of said judgment and sentence, if the said judgment and sentence be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit; and if the said N. Winston Henderson will appear for trial in the District Court of the United States, in and for the Southern District of California, Central Division, on such day or days as may be appointed for retrial by said District Court, and if the said judgment and sentence against him be reversed, then this obligation shall be null and void; otherwise to remain in full force and effect.

This Recognizance shall be deemed and construed to contain the "express agreement", summary judgment and execution thereon, mentioned in Rule 13 of the District Court.

N. W. HENDERSON

Principal

5502 Rimpau Bl.

Address

NORTHWEST C A S U A L T Y
COMPANY, a Washington
Corporation.

[Seal] By A. W. APPEL
A. W. APPEL, Its Attorney-
in-Fact
Surety.

Approved as to Form

CHARLES H. CARR
By JAMES M. CARTER
United States Attorney

I hereby certify that I have examined the within bond and that in my opinion the form thereof is correct and surety thereon is qualified.

AMES PETERSON
Attorney for Defendant and
Appellant.

The foregoing bond is approved this 6th day of August, 1943.

C. E. BEAUMONT,
United States District Judge

State of California,
County of Los Angeles.—ss.

On this 6th day of August, A. D. 1943, before me, Marva Weede, a Notary Public in and for the County and State aforesaid, duly commissioned and sworn, personally appeared A. W. Appel, Attorney-in-Fact of the Northwest Casualty Company a Washington corporation, to me personally known to be the individual and officer described

in and who executed the within instrument, and he acknowledged the same, and being by me duly sworn, deposes and says that he is the said officer of the Company aforesaid, and the seal affixed to the within instrument is the corporate seal of said Company, and that the said corporate seal and his signature as such officer were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of Los Angeles County of Los Angeles, the day and year first above written.

MARVA WEEDE

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires February 3, 1946 [26]

[Endorsed]: Filed Aug. 6, 1943 [27]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated by and between the parties hereto, and their respective attorneys, as follows:

(1) That the defendant and appellant may have up to and including the 20th day of September, 1943 within which to file his Assignment of Errors on Appeal;

(2) That the defendant and appellant may have up to and including the 6th day of October,

1943, within which to serve and lodge his Bill of Exceptions on Appeal;

(3) That the plaintiff may have up to and including the 16th day of October, 1943, within which to propose amendments to said proposed Bill of Exceptions; and

(4) That the defendant and appellant may have up to and including the 21st day of October, 1943, for the settlement and filing of said Bill of Exceptions.

Dated this 7th day of September, 1943

CHARLES H. CARR

Attorney for Plaintiff

AMES PETERSON

Attorney for Defendant

It Is So Ordered.

PAUL J. McCORMICK

Judge of the District Court

[Endorsed]: Filed Sept. 7, 1943. [28]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the District Court of the United States, in and for the Southern District of California, Central Division:

Sir:

Please prepare the transcript of the record on appeal in the above entitled cause consisting of the following documents:

1. Indictment;
2. Arraignment and Plea;
3. Petition to suppress evidence and return same;
4. Ruling on Petition to suppress evidence;
5. Verdict;
6. Judgment and Commitment;
7. Notice of Appeal;
8. Order fixing bond on appeal; [29]
9. Appeal bond;
10. Stipulations and Orders extending time to file Assignment of Errors, and to settle Bill of Exceptions;
11. Assignment of Errors;
12. Bill of Exceptions;
13. Praecipe.

AMES PETERSON

WILLIAM B. BEIRNE

Attorneys for Defendant and
Appellant.

[Endorsed]: Filed Nov. 12, 1943 [30]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 30 inclusive contain full,

true and correct copies of: Indictment; Minute Order Entered June 21, 1943; Petition to Suppress Evidence and to Direct the Return thereof to the Defendant; Minute Orders Entered July 13, 1943, July 14, 1943, July 15, 1943, July 16, 1943 and August 6, 1943 respectively; Judgment and Commitment; Notice of Appeal; Bail Bond on Appeal; Stipulation and Order and Praecipe which, together with Original Bill of Exceptions and Assignment of Errors transmitted herewith, constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for comparing, correcting and certifying the foregoing record amount to \$8.90 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 29 day of November, 1943.

EDMUND L. SMITH, Clerk

(Seal)

By THEODORE HOCKE

Deputy Clerk

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10519

N. WINSTON HENDERSON,

Appellant.

v.

UNITED STATES OF AMERICA,

Appellee.

ORDER EXTENDING TIME TO FILE PRO-
POSED AMENDMENTS TO BILL OF
EXCEPTIONS

Good cause appearing therefor,

It Is Ordered that the time within which the Appellee may file proposed amendments to the bill of exceptions in the above-entitled cause be enlarged to and including November 1, 1943; that the Court may have to November 15, 1943, within which to settle the same.

Dated: October 20, 1943.

CURTIS D. WILBUR

CLIFTON MATHEWS

ALBERT LEE STEPHENS.

United States Circuit Judges

A True Copy,

Attest, Oct. 20, 1943,

PAUL P. O'BRIEN

(Seal)

Clerk.

[Endorsed]: Filed Oct. 20, 1943; Paul P. O'Brien, Clerk,

[Endorsed]: Filed Oct. 21, 1943, Edmund L. Smith Clerk By Irwin Hames, Deputy Clerk.

In the District Court of the United States in and
for the Southern District of California Central Division

No. 16044—Criminal

UNITED STATES OF AMERICA

Plaintiff,

—vs.—

NATHANIEL WINSTON HENDERSON,

Defendant.

BILL OF EXCEPTIONS

GRACE SOUTHWORTH KINGON

called as a first Government witness testified as follows:

I am the clerk at the rationing board No. 5-48, which is located at 1979 S. Vermont Ave., Los Angeles. I have been working at that place continuously during the past year, and I know the defendant Mr. Henderson. He became Chairman of the War Rationing Board here in August, 1942. I recognize the document which you hand me (Government's Exhibit "1") it is an office memorandum and directs that coupons from mileage rationing books be burned at the close of business each day. I recognize the handwriting of Mr. Henderson on the bottom of this memorandum, which handwriting is as follows: "No incinerator available in neighborhood." (Tr. P. 16). Mr. Henderson used to spend about eight hours a day

(Testimony of Grace Southworth Kingon.)
at the rationing board, and he was there about 5½ days a week. I saw Mr. Henderson in the general room at the rationing board daily.

Q. By Mr. Norcop: I will ask you if you can state what was done with these gasoline ration coupons there in the gasoline section when they were tailored out of the books?

Mr. Cannon: To which we object on the ground that it has no value at all in this case; it is immaterial; it would not prove or tend to prove any issue in this case, matter of custom not being in issue.

The Court: What is the purpose of this, Mr. Norcop?

Mr. Norcop: If the Court please, under the first count of the indictment we accuse the defendant of embezzlement. And as I understand, embezzlement is like in a bank, you have a right to prove the transactions that go on in the bank, if you are accusing the bank cashier of embezzlement. Among other things you have to show his access to the books what his duties were, and what was done. And you have to prove every element of embezzlement in that fashion. You can't prove it by anything except what happened on the spot from time to time.

Mr. Peterson: Ordinarily I know the Court would not want to [1*] hear from both counsel. I want to make this observation, in addition to

*Page numbering appearing at foot of page of original Bill of Exceptions.

(Testimony of Grace Southworth Kingon.)

what Mr. Cannon says, in answer to what Mr. Norcop advanced. This indictment charges a specific act upon a specific date with reference to a specific number of coupons. That is what we are here to meet; that is what we are charged with. The testimony from this employee of that board as to what was the custom upon other days has nothing to do with the charge that we are here very specifically required to meet. I object to it for that reason.

The Court: The objection is overruled. You may answer.

Mr. Peterson; Note an exception, please.

The Witness: Each person who is tailoring books puts the coupons that they took from the books in a box on their desk. At the end of the day they were gathered up either by Mr. Henderson (the defendant) or the chief clerk, and burned. Up to a certain time under instructions from the OPA the Chairman of the Board would burn them. (Tr. p. 20). They were put into a paper sack, like an ordinary grocer's sack, and Mr. Henderson would take the sack away with him. The coupons were put into paper sacks and given to Mr. Henderson. I never saw Mr. Henderson burn any paper sacks with gas rationing coupons in them. I saw Mr. Henderson at the Board about 2:00 o'clock in the afternoon. I think on the 24th of May. (Tr. p. 28) He came in and said, "Hello everybody." We visited around and I went back to my desk and to my work, and Mr.

(Testimony of Grace Southworth Kingon.)

Henderson went up to the front door and talked to the customers as they came in, and inquired what they wanted and tried to help them the rest of the day. I would say he was there (Tr. p. 30) until about 6:00 o'clock, and then he came back to work during the evening, and it became time to gather up the books and put them in the bank, and Mr. Henderson said that the books were not to be put away; that they were going to write books that evening and issue books, so the books were left out. I think they only wrote "A", "B" and "C" books that night. Mr. Tinley did not return the books to the bank that day. On that particular evening (Tr. p. 37) there were other persons present on [2] the premises occupied by the Board. Whereupon the following occurred:

Q. By Mr. Norcop: How late did you work that day?

Mr. Peterson: I object to that on the ground it is not material. It is not shown the defendant was there.

Mr. Norcop: Now, I am going to come——

The Court: It is overruled. You may answer.

Mr. Peterson; Note an exception.

The Court: You may answer it, Mrs. Kingon.

The Witness: May I have it again, please?

The Court: Read the question please, Mr. Bargion.

(Question read by the Reporter)

A. Until around 6:30.

(Testimony of Grace Southworth Kingon.)

Q. By Mr. Norcop: Do you know of your own knowledge whether the office was open that evening for tailoring books?

A. It was open that evening.

Mr. Norcop: May I be pardoned just a moment now, your Honor?

The Court: That is all right.

(Witness addressing the Court)

The Court: Did you get the statement of the witness?

The Reporter: No, I did not, your Honor.

The Court: The witness turned to the Court and said, "I am sorry, your Honor." and it is now in the record. Many witnesses make the same mistake, Mrs. Kingon.

Q. By Mr. Norcop: Directing your attention, Mrs. Kingon, did any conversation occur at any time between you and Mr. Henderson or Mr. Henderson and someone else in your presence, concerning any missing gasoline books at that Board?

A. No.

Q. Do you recall any discussion as to any hiatus in the records between another Board member and Mr. Henderson that was discussed by him in your presence as to one book? [3]

Mr. Peterson: That is objected to upon the ground it is not within any issue of this indictment. The witness has already precluded further inquiry by answering that there was no conversation, in the previous answer.

(Testimony of Grace Southworth Kingon.)

Mr. Norcop: We have a right to direct the witness, I think, if I may be so bold as to suggest, to direct her attention to a subject, because I know what I have in mind.

Mr. Peterson: I just want my objection to be very clearly in the record, that I am objecting for the reason it is not within the issue raised in either count of the indictment.

The Court: The objection is overruled.

Mr. Peterson: And an exception noted.

Mr. Norcop: Mr. Reporter, will you re-read the question now, please the last question?

(Question read by the Reporter)

A. No; I don't.

The Witness Recalled for Further Direct
Examination

Br. Norcop: Q. I asked you yesterday afternoon if you had a conversation with Mr. Henderson regarding a "C" gasoline book, and your answer was in the negative. A. Yes.

FRED E. YERGER

called as a witness on behalf of the Government testified as follows:

I am Boards Operation officer, office of Price Administration, in Los Angeles. The document which you show me (Government's Exhibit "3") is a record out of the Ration Board, and which

(Testimony of Fred E. Yerger.)

is used in its daily work (Tr. p. 52). This document shows part of the duties of the Chairman of the War Ration Board [4]

Cross Examination

By Mr. Cannon:

A. The document which you now show me, dated August 28, 1942, was signed by me and transmitted to Mr. Henderson. This document was received in evidence and marked defendant's Exhibit "A" and is as follows:

"Dear Mr. Henderson:

"At the request of the Administrator, Office of Price Administration, Washington, D. C. pursuant to the recommendation of the Defense Council Organization in your State, you are appointed as Chairman of the War Price and Rationing Board No. 5-48 State of Calif. without compensation for an indefinite period. During this period your services will be without compensation or reimbursement for travel or other expenses from the United States. Kindly retain this letter as evidence of your appointment, and sign the enclosed statement of acceptance which should be returned promptly to this office. This action is necessary for official completion of your appointment.

(Testimony of Fred E. Yerger.)

“We appreciate your patriotic cooperation in this very important work.

“Yours very truly,

“FRED E. YERGER,

“State Organization Officer.”

It is a fact that we did have robberies committed at different War Ration Boards. I cannot say (Tr. p. 61) whether or not a large number of “A” coupon books were stolen. I will state (Tr. p. 65) that I did see a notation by Mr. Henderson to the effect that no incinerators were available in the neighborhood in which to burn coupons, and I will state that I did not do anything about this, [5] although it is true that I instructed Mr. Henderson to burn them. But I did not take into consideration the fact that there was an ordinance in The City of Los Angeles prohibiting the burning of anything after 4 p.m. Nevertheless, the instructions for the burning of coupons at the end of each business day came out of my office. (Tr. p. 66). Our auditing staff never functioned (Tr. p. 77) after Mr. Henderson was arrested. I audited that Board, but I can not tell you whether or not the books were in good order. Whereupon Mr. Norcop made the following statement to the Court:

By Mr. Norcop:

Now, we are going to prove through this case several other embezzlements, or we are going to offer to prove several other cases of embezzlement, and in the one I am bringing up now the facts cen-

(Testimony of Fred E. Yerger.)

ter around the date, the earliest date on this form is January 22, 1943, that would be five months prior to the date alleged in the indictment, and that is the issue we put to the Court; we think we are entitled to prove other embezzlements as tending to show criminal intent. They don't of course, prove the guilt or innocence of the defendant on the specific charge named in the indictment. That is the issue we submit and we ask the Court to consider our request to so rule.

The Court: What is your position regarding the theft?

Read the last statement of Mr. Norcop, please, Mr. Goldstein.

(The record was read.)

The Court: Now read my statement.

(The record was read.)

The Court: What is the point you have in mind that you want to prove by showing the similar offenses?

Mr. Norcop: I think we have established and completed the necessary testimony to show that Mr. Henderson was first a member of the War Ration Board, and throughout all this period he was chairman of this War Ration Board, and his instructions and duties [6] are enumerated in these exhibits that we have here, and what they were supposed to do with tailored coupons; that is, burn them and destroy them.

In the light of Zerbst, if your Honor wants me

(Testimony of Fred E. Yerger.)

to take time to go into that—here is what those cases hold: That if the culprit conceived the idea to steal while the things were lawfully in his control and under his custody, it is embezzlement. If he took them away from the place where they were lawfully, legally, and had a right, say, to take them out to his home, if it could be construed in the course of his duties, or, we will say, the looseness of these regulations, and counsel mentioned about not burning after 9:00 o'clock in the morning, a city ordinance, assume, then, it would be perfectly proper for him to transport those sacks out to his home for the purpose of burning them the next morning before 9:00 o'clock, then, I suppose, constructively he is still in legal possession of documents, and if he conceives the idea at his home to steal them, misappropriate them, put them in his own pocket, then sell them to somebody, that that would be embezzlement. And the fact that he did it once in January, the fact that he did it again, we will say, in April, and the fact that he did it several times in May, and we prove, as we expect to, on June 2nd, would enable the jury to see what was his line of conduct, and whether he did this innocently by accident or mistake or frame-up, so to speak, or whether it is reasonable to suppose that the man did it repeatedly while he was chairman of that board would do it on June 2nd. And I think a safe instruction could be given to the jury to limit it for that sole purpose.

Do I make myself clear?

(Testimony of Fred E. Yerger.)

The Court: I believe that you have. You intend to show commission of other offenses for the purpose of proving intent in the commission of the offense which is charged in the indictment?

Mr. Norcop: Yes, your Honor. And I can argue further, [7] but I don't know how much your Honor wants.

The Court: The Court is familiar with the general principle that where there is a scheme to defraud, that evidence of other offenses that are of like nature may be shown; that such evidence may be received as bearing upon the question of intent. But there also is a line of demarcation stated in some of the cases upon the question of intent; that there may be some cases where it isn't necessary to show the element of intent as to a particular thing. Now, there may be cases where the question arises whether it was done through mistake or accident or inadvertence, or without any wrongful motive. Then, of course, it becomes necessary to show intent and to offer proof for that purpose.

Certainly, in such situation the proof of other offenses may be shown. That is the general principle.

I am just wondering whether the case is in such status at the present time that you definitely are in a position to offer such proof now.

Mr. Norcop: May I interrupt your Honor to suggest this? We feel that the Government must prove specific criminal intent after the evidence is all in to be entitled to a conviction under the em-

bezzlement count. We, likewise, feel we must prove specific intent under the second count of stealing and purloining.

JAMES P. MURRAY,

called as a witness on behalf of the Government testified as follows: (Tr. p. 94)

At the time when I saw Mr. Henderson at 1979 S. Vermont Ave., I was a whiskey salesman, and I went out to get my "C" book. I had a conversation with him (Tr. p. 96).

By Mr. Norcop:

Q. Tell the jury what was said and done by——

Mr. Cannon: Objected to as immaterial, having no issue in the case, too remote. [8]

The Court: It is overruled.

Mr. Cannon: Exception.

The Witness (continuing): I told Mr. Henderson that I had an "A" book and I was applying for my "C" book in order to get enough gasoline to run both jobs that I was working at, and I asked Mr. Henderson if I could get some coupons, enough to run me on until I could get my "C" book. He had a paper sack down there at the end of the desk and he reached in and gave me a few coupons and said, "I think this will run you until you can get the book through." I again talked to Mr. Henderson a couple of days later when I went back to get my "C" book. I just got my book and went on out. Later when I ran out of extra tick-

(Testimony of James P. Murray.)

ets I went back and asked him if I could get some more, and I had a conversation with Mr. Henderson on the sidewalk in front of the rationing board.

Q. Give us the conversation.

Mr. Cannon: If the court please, I object on the ground that it is immaterial and has no bearing on the issues in this case, and particularly on the ground that it is too remote.

The Court: Overruled.

Mr. Cannon: Exception. If the Court please, without having to interrupt each time on these various conversations, may it be understood without my making specific objections to each portion of the testimony of the witness having to do with this conversation, that I have a running objection to the entire conversation.

The Court: "As far as this conversation is concerned, it is satisfactory to the court, if it is agreeable to Mr. Norcop."

Mr. Norcop: That is agreeable, your Honor.

The Court: Very well.

Mr. Peterson: The same exception taken or noted as though verbally stated.

The Court: That is understood.

Mr. Norcop: So stipulated. [9]

The Witness: I asked Mr. Henderson at that time if I could get any more tickets, that I was about to run out, and I wanted some more to make a trip up to Bakersfield, and he says, "I will give you a few more." He said, "If you go out there in my car, it is parked on a lot, there are

(Testimony of James P. Murray.)

some folded up in a newspaper, and they are sticking on the inside of the door handle on the left hand side there where the steering wheel is." And I went out. I said, "Which car is it?" And he pointed it out, and I went out there and found this newspaper and some tickets inside the newspaper, that is, separate tickets, they wasn't all in sheets, just torn up.

Q. By Mr. Norcop: What do you mean by tickets?

A. I mean coupons, gas rationing coupons, "C" coupons.

Q. Did you take them? A. Yes, sir.

Q. When did you next have a conversation with Mr. Henderson concerning gas coupons?

A. As well as I recall that was the 30th, around close to the 30th of January, 1943.

Q. Where? A. Over at the ration board.

Q. Who was present that heard the conversation?

A. There wasn't anybody present then; we were discussing the coupons.

Q. Were you inside the ration board?

A. No; we were on the outside on the sidewalk, and Mr. Henderson and I were discussing getting him some Calvert whiskey.

Q. Tell us everything that was said and done.

A. He asked me if I could get him some Calvert whiskey——

Mr. Cannon: Just a minute. I object on the

(Testimony of James P. Murray.)

ground it has no bearing on the issue in the case, immaterial, and too remote.

The Court: Overruled.

Mr. Cannon: Exception. May I have a running objection to [10] this conversation, and may it be deemed to be overruled and an exception taken?

The Court: It is agreeable to the Court.

Mr. Norcop: So stipulated.

The Witness: What am I supposed to do now?

The Court: Read the question, please, Mr. Goldstein.

(The question and answer were read.)

The Witness: I told him we didn't handle Calvert, we handled 'Seagram, and the companies wouldn't let us handle both kinds, and I couldn't get him any Calvert.

Q. By Mr. Norcop: What did he say?

A. At that particular time? He told me *that* that I couldn't get any more tickets without a cost to me. He said friendship would go a long way, but we just can't continue this. He said, "If you could sell some tickets I think I would be able to get you some." I said, "What do you ask for them? How much do I have to get for them? I never have tried to sell any."

Q. That is what you said to him?

A. Yes, sir. And he said I can sell them for \$20 a thousand. That is, I would have to pay him that for them. And all over the \$20 I got out of it, it was up to me to keep.

Q. That is what he said?

A. Yes, sir.

(Testimony of James P. Murray.)

Q. Then what happened?

A. I went back to the board a few days later than that; he left me some tickets at that time.

The Court: What tickets do you mean?

The Witness: Coupons, I mean C coupons. I keep calling them tickets, but I mean C coupons, that is what I was handling.

Q. By Mr. Norcop: All right.

A. And I went back to the board—let's see—this was—

The Court: When you say you went back to the board—— [11]

The Witness: Rationing board over at 1979 South Vermont. This was in the latter part of January I am speaking about right now——

The Court: Can you hear the answers?

Mr. Peterson: No.

The Court: Read the statement of the witness.

(The record was read.)

Q. By Mr. Norcop: You were going to direct me to a conversation or a meeting that you had with Mr. Henderson subsequent to that date?

A. Yes, when I got the first——

Q. The approximate time, fix it any way you want.

A. Well, the ones he gave me then ran me up until February, with the coupons that I had in my book, they ran me up until around February.

Q. All right.

A. Then along about the first of March I asked

(Testimony of James P. Murray.)

him for some more tickets, and then he gave me the thousand gallons of tickets.

Q. Where were you, then, on this date, this occasion on the first of March?

The Court: Can you just as well say "coupons" if you mean coupons?

The Witness: I will try to remember that, your Honor. That is what I mean, coupons, gas coupons.

The Witness: (continuing) About the 1st of March I called Mr. Henderson and told him I thought I could sell one thousand. I called him up at his home. I recognized his voice (Tr. p. 106).

Mr. Cannon: I object to the conversation on the ground that it is immaterial and has no bearing on the issues in this case; does not tend to prove any issue in this case.

The Court: It is overruled.

Mr. Cannon: Exception.

The Witness: Well, I called him and told him I thought I [12] could sell one thousand gallons of C coupons that he asked me about. And he asked me where I was and I told him to meet me on the corner of Hoover and 36th Street, and in about 20 minutes he came down alone. He walked up East on 36th Street and he had a newspaper in his hand and let the newspaper down on the telegraph post and told me to go over there and pick it up, and I went over and picked it up and there was 250 "C" coupons in this paper. And I told him that the man was waiting out there at the gas station

(Testimony of James P. Murray.)

and I would be over to the rationing board and give it to him as soon as I could contact this man. And he said, "Well, call when you get over there." And I went over there as soon as I made the delivery of the tickets. I sold them to Mr. Hubler for \$40.00. I called Mr. Henderson at the rationing board (Tr. p. 108) and talked to him over the telephone. I recognized his voice and I said, "Come over to the lot there."

Mr. Cannon: I object to the question on the ground that it is immaterial, that it has no bearing on the issues in this case.

The Court: Overruled.

Mr. Cannon: Exception.

The Witness: (Continuing) I went over to the lot and sat down in his car and he came over in a few minutes and I gave him \$20.00.

By Mr. Norcop:

Q. Did you have any further conversation over there in his car?

Mr. Cannon: May my same objection go that it is immaterial, has no bearing on the issues in this case?

The Court: It may be so considered. Is this offered for the purpose of intent, showing these other matters, Mr. Norcop?

Mr. Norcop: Yes. For the purpose of showing intent.

Mr. Cannon: It is understood too that it has been offered and received over my objection, and

(Testimony of James P. Murray.)

an adverse ruling by the Court and an exception to that ruling. [13]

The Court: That is true.

By Mr. Norcop:

Q. Mr. Murray, had you finished relating the conversation? A. No, sir, I hadn't.

Mr. Norcop: Have you got your objection in that you wanted Mr. Cannon?

Mr. Cannon: Yes.

The defendant said that in the future whenever we contacted each other, it should not be done around the Board. He said, "When you call, if you want "A" tickets, call for Ancient Age Whiskey, and "B" tickets would be Brown Foreman, and "C" tickets would be Calverts." And if I was to want one thousand coupons I would ask for 1 case of whiskey. I saw him practically every week. The next time I believe was March 16th.

Mr. Norcop: State the conversation.

Mr. Cannon: Objected to on the ground that it has no bearing on the issues in this case.

The Court: Overruled.

Mr. Cannon: Exception.

By Mr. Norcop:

Q. Just tell us what was said and done as near as you can remember.

Mr. Peterson: To this we have the same objection, as heretofore stated.

The Court: It is overruled and an exception is noted.

(Testimony of James P. Murray.)

A. I told him I would like to have a refrigerator and he said "Why don't you write to Washington for it. If it is approved, I will sell you mine and then you can take the new one." I said O.K.

Mr. Peterson: I move to strike that out, if the Court please, all the conversation given about the refrigerator.

The Court: The Court has ruled to proceed.

A. I had a telephone conversation with him before I met him [14] at Jefferson and Crenshaw.

Q. What was the subject of the telephone conversation?

Mr. Cannon: Objected to on the ground that it is immaterial and has no bearing on the issues in this case.

The Court: Overruled.

Mr. Cannon: Exception.

The Witness: (Continuing) I told him I needed a case of Calverts and he said O.K. So we met at Jefferson and Crenshaw after the 'phone call.

Mr. Peterson: As to that conversation, the same objection heretofore made.

The Court: The same ruling.

Mr. Peterson: Save an exception.

A. I asked him to get me a "C" book. There was no money passed at that time. The book that you show me looks like the one that was in the can. (This was marked for identification.) I again saw him just a couple of days before I was arrested, and he gave me a little white box with three

(Testimony of James P. Murray.)

thousand "T" coupons and two thousand gallons of "C" coupons.

By Mr. Norcop:

Q. Tell the jury all that you said and all that he said and all that was done there.

Mr. Cannon: Objected to on the ground that it has no bearing on the issues of the case, and it is incompetent.

The Court: Overruled.

Mr. Cannon: Exception.

A. He told me he was going on a fishing trip and would leave me some coupons for sale, in the event I needed them. And on the envelope which you show me, he drew a map showing how I could get up to Lake Arrowhead.

Mr. Norcop: We offer that in evidence.

Mr. Cannon: Objected to as not bearing upon any issue in the case. [15]

The Court: Overruled.

Mr. Peterson: An exception.

Mr. Norcop: Did you have a telephone conversation with Mr. Henderson after that?

A. I did. After I was arrested. Witness (Continuing) I called him from the OPA office and present with me were three OPA investigators. That was on June 2nd. I asked him how his fishing trip was and he said O. K. I said I would like to have a case of Ancient Age and also half a case of Brown Foreman. He said he wouldn't have any Brown Foreman and I said I would substitute An-

(Testimony of James P. Murray.)

cient Age for it. I asked him where I should meet him and he said in front of his apartment building, Kenwood Arms Apartments on Kenwood and West Adams. So the three investigators and myself went out there (Tr. p. 130). Just before we got to the building the investigator searched me and I did not have any coupons on me then. I had thirty dollars; a \$20.00 bill and a \$10.00 bill, and they took the numbers off of these bills for identification. When I got to the apartment house I saw Mr. Henderson. He met me in front of it. The first thing I did I gave him the \$30.00, which he put in his pocket and he gave me a bunch of coupons which I put in my pocket, and then I took out my handkerchief and blew my nose, because that was to be the signal that I had given him the money. He said, "In the future any coupons that you get will be torn up. You won't get any more in sheets. I will put them in an envelope for you" and I said O. K., and then the officers came up and arrested us both. When Mr. Foster, one of the officers, walked up to us (Tr. p. 136) he said, "What's going on here?" And Henderson said, "I am talking to a friend of mine," and Foster says, "No you are not; I saw the whole transaction." Then he placed Mr. Henderson under arrest and reached in his pocket and got the \$10.00 and the \$20.00 bill.

Mr. Cannon: At this time I move to strike the testimony on the grounds heretofore stated in the written motion which we have [16] filed, that it

(Testimony of James P. Murray.)

was an unlawful search and an unlawful arrest, and I move to strike the testimony.

The Court: The motion is denied.

Mr. Cannon: An exception.

Mr. Norcop: We offer the two bills as one exhibit.

Mr. Peterson: We object to the introduction in evidence of the bills on the same grounds heretofore made relative to the unlawful search.

The Court: Overruled.

Mr. Peterson: An exception.

(Whereupon the bills referred to were received in evidence as Government's Exhibit 9.)

Mr. Norcop: I offer a package of gasoline coupons, to which the witness has just referred in his testimony.

Mr. Peterson: Same objection.

The Court: Overruled.

Mr. Peterson: An exception.

(Whereupon the gasoline coupons referred to were received in evidence as Government's Exhibit 10.)

The Witness: (Continuing) Just then Mr. Henderson ran his hand in his pocket and pulled out a purse and said, "If it's money that you want, I have plenty of it." He had a purse pretty well filled with bills and papers. Mr. Foster said, "I have got all I want."

(Testimony of James P. Murray.)

By Mr. Norcop:

Q. I now show you a little paste-board box and ask you if that is the box you had referred to in your testimony before the lunch hour.

A. It is the one that Mr. Henderson gave me just before going to Arrowhead.

Mr. Norcop: We offer this package in evidence with its contents.

Mr. Peterson: It is objected to on the ground that it is no part of the transaction for which the defendant is on trial. It is too remote and has no bearing on the issues set forth in the indictment. [17]

The Court: Overruled.

Mr. Peterson: An exception.

(Whereupon package and contents referred to were received in evidence as Government's Exhibit 11.)

The Witness: (Continuing) Just before going to Lake Arrowhead Henderson told me that inasmuch as he was getting no compensation for his work at the Board, he felt he should be reimbursed in some manner.

Cross Examination

By Mr. Peterson:

The Witness: (Continuing) When I first met Mr. Henderson I was a liquor salesman. Many times when I saw Mr. Henderson on Vermont Ave., he would be out in front of the rationing board directing members of the public to the various

(Testimony of James P. Murray.)

clerks who worked there. I did have some conversation with Mr. Henderson about getting some Nylon hose in North Carolina. I had been arrested before Mr. Henderson was arrested. After I was arrested I was released the next day on \$250.00 bond and talked to the officers several times afterwards concerning Mr. Henderson. I was only arrested on a misdemeanor charge and I have not yet been sentenced. And I knew when I was arrested that I could get one year in jail and a \$10,000.00 fine. I telephoned Mr. Henderson before his arrest.

By Mr. Peterson:

Q. From where did you telephone?

A. O.P.A. office.

Q. Here in Los Angeles? A. Yes, sir.

Q. And who was about you there?

A. Mr. Foster, Mr. Taylor and Mr. Smith.

Q. When you talked to Mr. Henderson you did not tell him, naturally, that those three gentlemen were there, did you? A. No, sir.

Q. And you did not tell him that shortly he was to be visited [18] by you and those three gentlemen? A. I did not.

Q. And this little handkerchief business that you had, that was a prearranged signal, was it?

A. That is right.

Q. Which was known only to you and the officers, but not known to Mr. Henderson?

A. That is right.

(Testimony of James P. Murray.)

Q. You didn't, I take it, make any opposition to the O.P.A. agents when they searched you, did you?

A. No, sir. Neither did Mr. Henderson.

Q. And you did not say, "Please don't do this," or anything of that sort?

A. Neither one of us did.

Q. Because you knew exactly what was going to take place, didn't you?

A. I knew that they were going to search us; yes, sir.

Q. And you knew exactly what those men were intending to do when they came up with you?

A. I knew if they saw the transaction—I presumed there would be an arrest. I didn't know; I just presumed it.

Q. You presumed that when you left the O.P.A. headquarters, didn't you?

A. That is right.

Q. And you came in two cars, as I take it?

A. That is right.

Q. And each car had the same destination?

A. That is right.

The Witness (Continuing) It is true that I hope that I am not going to be sent to jail.

By Mr. Peterson:

Q. Your bond has not been raised since your plea of guilty, has it? [19]

Mr. Norcop: Objected to as incompetent.

The Court: The objection is sustained.

Mr. Peterson: Note an exception.

The Witness (Continuing) Before giving Mr.

(Testimony of James P. Murray.)

Henderson the \$30.00 I discussed it with the officers in their office. One of the Government men suggested my calling Mr. Henderson on the phone the day he was arrested.

MARSHALL EASTON McFARLAND,

called as a Government witness testified as follows:

I made an application for additional mileage at the South Vermont Avenue address. I filed that with the ration board.

By Mr. Norcop:

Q. Did you or did you not have issued to you by the ration board more than one "C" book?

Mr. Cannon: I object on the ground that it is immaterial, having no bearing on the issues of the case. It would not prove or tend to prove anything.

The Court: Overruled

Mr. Cannon: Exception.

The Witness: (Continuing) There were coupons in the book when I returned it, the difference between the number that I used and the number that were issued to me. I did not use over five.

RICHARD W. SMITH,

called as a Government witness testified as follows:

I am an investigator from the Office of Price Ad-

(Testimony of Richard W. Smith.)

ministration, and I saw the defendant, Henderson, on June 2, 1943, near Kenwood and Adams. I saw Mr. Murray with him. I saw them greet each other. It looked like they were shaking hands. I crossed the street over to where they were. Mr. Foster and Mr. Taylor were right ahead of [20] me. (Tr. p. 205.) Mr. Foster put his hand in the left hand pocket of Mr Henderson and took out of his pocket a \$10.00 and a \$20.00 bill, and he then removed a package of "A" gasoline coupons from Mr. Murray's left hand pocket, and then made a search of Mr. Henderson's automobile, but he did not take anything from it. We took the serial numbers from the two bills on the morning of the 2nd of June, before we saw Mr. Henderson. I did not see money pass between Henderson and Murray and I did not see the coupons passed between the men.

JONA H. TAYLOR

called as a Government witness testified as follows:

I am legal investigator for the Office of Price Administration and I saw Mr. Henderson on the morning of June 2nd. Before going out to Henderson's place we searched Murray and kept him in our sight at all times. I saw Murray approaching Mr. Henderson and they shook hands, and a little later Mr. Murray took out his handkerchief and blew his nose, and we walked over to where the two men were standing, and I told Henderson

(Testimony of Jona H. Taylor.)

that he was under arrest. Then Mr. Foster reached in Mr. Henderson's pocket and took the money that had passed from Murray to Henderson, and the two bills that you now show me are the bills he took. I did not see anything pass between the two men that I could identify at the time.

JOHN E. FOSTER,

called as a Government witness testified as follows:

I am an investigator for the Office of Price Administration. I saw the witness Murray at my office on the 2nd day of June of this year. I heard Mr. Murray in my presence, and in my office on South Broadway make a telephone call.

By Mr. Norcop:

Q. Tell the jury what you heard Mr. Murray say? [21]

Mr. Cannon: I object to it as being hearsay, and no proper foundation.

(Whereupon the conversation was not admitted in evidence.)

The Witness: (Continuing) I later in the same day saw Mr. Murray at the Kenwood Arms Apartment on West Adams Boulevard in company with the defendant (Henderson). I told Henderson I was with the Office of Price Administration and told him he was under arrest, and I searched him and found one \$10.00 and one \$20.00 bill which I had punched earlier in the morning to identify

(Testimony of John E. Foster.)

them. And at the same time I took out a bunch of coupons from Murray's pocket. I saw Mr. Henderson in his Cadillac automobile and a man came to the car and said, "Why haven't you been over to see me?" And Henderson said, "I didn't get any fish for you," and the man started away and I called him back and told him to give me his name and address.

Mr. Cannon: I move to strike the last part of that statement as incompetent and immaterial, having no bearing on the issues of this case and as an event subsequent to the arrest and subsequent to the alleged offense.

The Court: Motion is denied.

Mr. Cannon: An exception.

The Witness: (Continuing) The map which you show me is a correct representation of where events I describe took place. I did not have a search warrant at that time, nor did I have a warrant for Henderson's arrest, nor am I a Federal Bureau of Investigation agent, nor a United States Marshal, nor a Deputy Marshal. I am not a City Police Officer, and I am not a County Police officer.

MINNIE SMITH

witness for the Government, testified as follows:

That she was a paid employee of the War Ration Board on South Vermont Ave. I was working at the Board on May 24th of this [22] year, and cou-

(Testimony of Minnie Smith.)

pons were tailored on that evening. The Board was open on May 31st, but no gasoline books were tailored on the evening of that day.

(Whereupon followed a lengthy discussion of points of law between counsel and the Court, which is not included in this Bill.)

Whereupon the Government rested (Tr. p. 325) and counsel for the defendant moved the Court to direct a verdict of Not Guilty as against the defendant on both Counts, which motions were by the Court denied and an exception allowed. (Tr. p. 326)

Whereupon five witnesses were called, to-wit: Murray Armstrong, Sidney Redpath, Kenneth A. MacIntyre, Robert A. Stillwell, and Edward F. Herzog, all of whom testified that they had known the defendant for many years; that his reputation for truth, honesty, and integrity and for being a law-abiding citizen was good. Whereupon (Tr. p. 334) the defendant again moved the court for a directed verdict of acquittal, as the evidence was all closed, which motion was by the Court denied and an exception allowed.

Whereupon the Court instructed the jury as follows:

Gentlemen of the jury, the Court will not proceed to instruct you upon the law applicable to the case, and will attempt to do this as concisely as is reasonably possible considering the nature of the case and the extent of the evidence which has been presented.

By the finding of an indictment no presumption whatsoever arises to indicate that a defendant is guilty, or that he has any connection with, or responsibility for, the act charged against him. A defendant is presumed to be innocent at all stages of the proceedings until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. And this rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction.

A reasonable doubt is such a doubt as you may have in your [23] minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs.

Reasonable doubt is not a mere possible or imaginary doubt or a bare conjecture; for it is difficult to prove a thing to an absolute certainty.

You are the sole judges of the credibility and the weight to be given to the witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified; by the character of his testimony, or by evidence affecting his character for truth, honesty, and integrity, or his motives; or by contradictory evidence.

In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men.

The opinion of the judge as to the guilt or the innocence of a defendant, if directly or impliedly expressed in these instructions or at any time during the trial, is not binding upon the jury, for to the jury exclusively belongs the duty of determining the facts. The law you must accept from the Court as correctly declared in these instructions. The instructions are to be considered as a whole.

You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the Government or the defendant, the manner in which he might be affected by the verdict [24] and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter which tends reasonably to shed light upon his credibility.

A conviction may be had on circumstantial evidence alone, where all the circumstances distinctly point to the guilt of the accused and are unexplainable on any other reasonable hypothesis.

A fact in issue may be proved either by direct evidence or by proof of other facts or circumstances from which the fact in issue may be inferred.

In determining what your verdict shall be you are to consider only the evidence before you. **Any**

testimony as to which an objection was sustained, and any testimony which was ordered stricken out, must be wholly left out of account and disregarded.

If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury may distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness's testimony.

The first count of the indictment in this case charges the defendant, N. Winston Henderson, with the violation of Section 100 of Title 18, of the United States Code Annotated, which reads as follows:

“Whoever shall embezzle, steal or purloin any money, property, record, voucher, or valuable things however, of the monies, goods, chattels, records, or property of the United States, shall be . . . ”

punished according to law. The extent of the punishment is not a matter for the jury, but for the Court.

Where one comes lawfully into possession of property and afterwards and while it is in his possession forms and carries out the purpose of appropriating it to his own use, the crime thus committed is the crime of embezzlement.

Embezzlement is the fraudulent appropriation of property by [25] a person to whom it has been entrusted or into whose hands it has lawfully come.

You must weigh and consider the case without any regard to sympathy, prejudice, or passion for or against any party to the action.

You are instructed that any evidence which was admitted bearing on the alleged embezzlement by the defendant of any gasoline ration coupons, other than those mentioned in the indictment, is not to be considered by you for the purpose other than the question of defendant's intent concerning the coupons charged in the indictment as having been embezzled by him.

Before the jury may infer guilty intent from the evidence of another crime of a like nature, such offenses and all the elements thereof must be established by evidence which is plain, clear, and conclusive.

The jury may infer guilty intent from evidence of other crimes of a like nature, if any is shown by the evidence, only if it first believes from other evidence that the act charged by the indictment was done by the plaintiff.

You are instructed that the first count of the indictment charges that on or about the 2nd day of June, 1943, at Los Angeles, California, the defendant knowingly, wilfully, unlawfully, and feloniously embezzled certain property of the United States, described as: 250 "A" gasoline ration coupons, which the defendant knew to be the property of the United States, and which had come into his possession in the regular course of his official duty as chairman of the War Price and Ration Board, No. 5048.

Unless you find beyond a reasonable doubt and to a moral certainty that the defendant committed each one of the acts charged against him in the first

count of the indictment, then it is your duty to acquit the defendant, and if you entertain a reasonable doubt as to whether or not any one element of the defense as set [26] forth in the first count of the indictment is not substantiated by the proof offered by the Government, then it is your duty to acquit the defendant. The defendant is not required to establish his innocence. The Government is required to establish his guilt to a moral certainty and beyond all reasonable doubt.

If you should find that the witness, James P. Murray, was an accomplice and co-conspirator with the defendant in connection with the commission of any unlawful acts, the testimony of the said James P. Murray should be viewed with caution and carefully scrutinized before you would be justified in believing it.

If you are satisfied that prior to the commission of the acts alleged to constitute the crime, that the defendant never conceived any intention of committing the offense of embezzlement as charged in the indictment, but that the officers of the Government incited and by suasion and representations lured him to commit the offense alleged in order to entrap, arrest, and prosecute him therefor, then these facts are fatal to the prosecution and the defendant is entitled to a verdict of not guilty.

You are instructed that if an officer of the law has reason to believe that the law is being violated, he may proceed to ascertain whether those who are thought to be doing so are actually committing it.

If the officers of the Government act in good faith and in the honest belief that the defendant is engaged in unlawful activities of which the offense charged in the indictment is a part and the purpose is not to induce an innocent man to commit a crime, but to secure evidence upon which a guilty man can be brought to justice, the defense of entrapment is without merit.

You are instructed that it is the right and privilege of the defendant either to take the witness stand and testify, or to remain silent and not appear as a witness; and you are further instructed that the burden rests upon the Government to prove all of the material [27] allegations of the indictment beyond a reasonable doubt, and such burden does not rest upon the defendant to prove his innocence, and no inference may be drawn or considered by you by reason of the fact that the defendant has not testified.

To warrant in convicting the defendant, the evidence to your minds must exclude every reasonable hypothesis other than the guilt of the defendant. That is to say, if after an entire consideration and comparison of all of the evidence in the case you can reasonably explain the facts given in evidence on any reasonable ground other than the guilt of the defendant, you should acquit him.

If, upon consideration of the whole case, you are satisfied to a moral certainty, and beyond a reasonable doubt, of the guilt of the defendant, you should so find irrespective of whether such certainty has been produced by direct evidence or by circum-

stantial evidence, or by a combination of both. The law makes no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both. Of course, if you have a reasonable doubt as to the guilt of the defendant as charged, your verdict must be not guilty.

A verdict requires the unanimous agreement of the jury. Whatever your verdict may be, whether it is guilty or not guilty, it must represent the agreement of all the members of the jury, and must be signed by your foreman.

For your convenience the Court has had prepared a form of verdict which you may take with you when you retire to deliberate.

Mr. Norcop: May I ask on question, your Honor? Did your Honor consider, or was it delivered to you, this?

(Passing document to Court.)

The Court: You are instructed that one of the provisions of Gasoline Ration Order No. 5-C reads as follows: [28]

“All coupon books, bulk coupons, inventory coupons, and other evidences are, and when issued shall remain the property of the Office of Price Administration.”

As the Court has stated, it has had prepared a form of verdict which you may take with you when you retire to deliberate.

Will you swear the officers?

Mr. Cannon: Are we not required, under the rules of the Ninth Circuit Court, to take exception before the jury? I think we are, and I don't want to be in error.

The Court: You may do so.

Mr. Cannon: We except to the instruction last read, having to do with the regulations of the O. P. A., on the ground it is not justified by any evidence in the case; and we take an exception to your Honor's failure to give as submitted the instruction we proposed with respect to the entrapment, and defense, which is embodied in the unnumbered sheet which cites the two cases: *Woowai vs. United States*, and *Sam Yick, vs. United States*.

I merely give those citations to identify the instruction.

The Court: It will be marked as having been refused.

Mr. Cannon: Yes. At this time we respectfully ask your Honor, for the purpose of the record, to instruct the jury to acquit.

The Court: That motion is denied.

Mr. Cannon: Exception.

Mr. Peterson: Just one thing.

(Discussion between counsel.)

Mr. Peterson: Mr. Cannon and I decided that was not important and will not ask your Honor.

The Court: What is that?

Mr. Peterson: It was a matter I had in mind, but we decided to ask you not to instruct.

The Court: Very well. Swear the officer.

AMES PETERSON and

WILLIAM B. BEIRNE

By AMES PETERSON

Attorneys for Defendant and
Appellant [29]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated that the foregoing Bill of Exceptions is correct, and that the same may be settled and allowed by this Court.

AMES PETERSON

WILLIAM B. BEIRNE

Attorneys for Defendant and
Appellant.

CHARLES H. CARR,

United States Attorney

By V. P. LUCAS

Assistant United States
Attorney

This Bill of Exceptions having been duly presented to the Court is hereby allowed and made a part of the record in this case.

Dated this 28th day of October, 1943.

C. E. BEAUMONT,

United States District Judge

Received Copy of the within Proposed Bill of Exceptions this 5th day of October, 1943.

CHARLES H. CARR,
United States Attorney
By JAMES M. CARTER
Asst. U. S. Attorney

[Endorsed]: Lodged Oct. 5, 1943, Edmund L. Smith, Clerk, by Irwin C. Hames, Deputy Clerk.

[Endorsed]: Filed Oct. 28, 1943, Edmund L. Smith, Clerk, by R. B. Clifton, Deputy Clerk.

[Endorsed]: No. 10519 United States Circuit Court of Appeals for the Ninth Circuit, Nathaniel Winston Henderson, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California Central Division.

Filed November 30, 1943.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the District Court of the United States in and
for the Southern District of California Central
Division

No. 16044—Criminal

UNITED STATES OF AMERICA

Plaintiff

—vs—

NATHANIEL WINSTON HENDERSON,
Defendant.

ASSIGNMENT OF ERRORS

I.

That the Court erred in refusing to direct the jury to bring in a verdict of Not Guilty as to each Count in the Indictment at the close of the Government's case in chief.

II.

That the Court erred in refusing to direct the jury to bring in a verdict of Not Guilty as to each Count in the Indictment at the conclusion of all of the testimony and evidence in the case.

III.

That the Court erred in allowing in evidence testimony concerning offenses other than those set forth in the Indictment upon which the defendant was on trial.

Dated this 17th day of September, 1943.

AMES PETERSON

WILLIAM B. BEIRNE

By WILLIAM B. BEIRNE

Attorneys for Defendant and
Appellant

Received copy of the within Assignment of Errors this 17th day of September, 1943.

CHARLES H. CARR,

U. S. Attorney, for Plaintiff.

[Endorsed]: Filed Sept. 17, 1943, Edmund L. Smith, Clerk. By Irwin C. Hames, Deputy Clerk.

[Endorsed]: Filed Nov. 30, 1943, Paul P. O'Brien, Clerk.

No. 10,519

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NATHANIEL WINSTON HENDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

FILED

JAN 26 1944

PAUL P. O'BRIEN,
CLERK

AMES PETERSON,
925 Stock Exchange Building, Los Angeles,
WILLIAM B. BEIRNE,
904 Washington Building, Los Angeles,
Attorneys for Appellant.

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knew to be the property of the United States, and which had come into his possession in the regular course of his official duty as Chairman of said War Price and Rationing Board. The second count makes the same allegations, except that instead of charging embezzlement it alleges that appellant "did knowingly, wilfully, unlawfully, and feloniously steal and purloin" the said 250 "A" gasoline rationing coupons.

To both counts of the indictment appellant pleaded not guilty [Tr. pp. 4 and 5], and, after a trial in said United States District Court the jury returned a verdict of guilty upon the charge of embezzlement, the first count of the indictment. [Tr. p. 22.] The second count of the indictment was dismissed upon motion of the United States Attorney before the cause was submitted to the jury. [Tr. p. 21.]

Thereafter, the Court sentenced appellant to imprisonment for a term of 5 years upon the charge of which he had been convicted [Tr. pp. 24 and 25]; and the case is now before this Honorable Court upon an appeal from that judgment. [Tr. pp. 25 and 26.]

Jurisdictional Statement.

A. The District Court had jurisdiction under the provisions of Section 41(2), Title 28, United States Code.

B. Under Section 546 of Title 18, United States Code, the crime with which appellant was charged is cognizable in the District Court.

C. This Court has jurisdiction by virtue of the provisions of Sections 225(a) and (d), Title 28, United States Code.

Statement of the Case.

Appellant was appointed Chairman of War Price and Rationing Board No. 5-48 of the State of California, by the Office of Price Administration on August 28, 1942. The Board had its offices at 1979 S. Vermont Avenue, in the City of Los Angeles. [Tr. p. 36.]

James P. Murray, a government witness, is the person who, according to his testimony, purchased from appellant the 250 "A" gasoline coupons, which formed the **basis** of the count upon which appellant was convicted. Murray testified that at the time he first saw the appellant at the Rationing Board Office, he, Murray, was engaged in the business of selling whiskey. [Tr. p. 47; App. p. 1.] Thereupon, over objection of appellant, Murray was permitted to testify as to at least six occasions prior to the date of the charge set forth in the indictment, upon which, according to him, he had illegally obtained "B" and "C" gasoline coupons from appellant, and also as to various incriminating conversations had with appellant concerning these coupons and the payment of money to appellant therefor. No charge as to any of these transactions is contained in the indictment. The testimony as to these purported offenses is contained in the appendix hereto attached, on pages 1 to 7 thereof.

On the 26th of May, Murray was arrested for selling gasoline coupons. He was released on \$250.00 bond and later pleaded guilty to the charge. Subsequently to his arrest Murray talked several times to the Government Officers Foster, Taylor and Smith concerning appellant. [Tr. p. 60.] On the morning of June 2nd, the day of appellant's arrest, Murray phoned appellant

from the office of the Office of Price Administration in the presence of Foster, Taylor and Smith, investigators for that office. [Tr. p. 60.] This phone call was made at the suggestion of one of those men. [Tr. p. 62.] Murray did not tell appellant that these men were there, nor that appellant was shortly to be visited by them. [Tr. p. 60.] He told appellant at that time that he would like to have a case of Ancient Age and also a case of Brown Foreman. Appellant said he did not have any Brown Foreman, and suggested another half case of Ancient Age for it, to which Murray agreed. [Tr. pp. 56 and 57.] (Murray had previously testified that on an earlier occasion appellant had suggested using the name of "Ancient Age Whiskey" for "A" tickets and the name "Brown Foreman" for "B" tickets. [Tr. p. 54.]) In that conversation arrangements were made for Murray to meet appellant in front of appellant's apartment building, the Kenwood Arms Apartments on Kingsley and West Adams streets in the city of Los Angeles. [Tr. p. 57.] Thereupon, Foster Taylor and Smith, the OPA investigators, and Murray, went out to the apartment house. [Tr. p. 57.] Prior to reaching their destination the investigators searched Murray and found that he did not have any coupons on him at that time. He had in his possession a \$20.00 bill and a \$10.00 bill, and the investigators took the numbers off of those bills for identification. Murray met appellant in front of the apartment house where Murray gave appellant \$30.00, which he put in his pocket and appellant gave Murray a bunch of coupons which Murray put in his pocket. Murray thereupon signaled to the three OPA investigators who then came upon the scene and arrested both appellant and Murray. [Tr. p. 57.]

No objection was made by Murray when the OPA investigators search him at that time, because he knew exactly what was going to take place. When he left the OPA headquarters he presumed that there would be an arrest. Before giving appellant the \$30.00 he discussed it with the OPA investigators in their office. [Tr. pp. 61 and 62.] During the testimony of the witness Murray, there was introduced in evidence as Government's Exhibit 9, the \$20.00 bill and the \$10.00 bill referred to by the witness in his testimony. [Tr. p. 58.] There was also introduced in evidence at that time, as Government's Exhibit 10, the package of gasoline coupons which Murray testified he had received from appellant at the time of the passing of the \$30.00. [Tr. p. 58.]

Richard W. Smith, a Government witness, testified that he was an investigator for the OPA; that he saw Murray meet appellant on the occasion when the \$30.00 changed hands; that he saw Mr. Foster, also an investigator for the OPA, put his hand in appellant's pocket and take out a \$20.00 bill and a \$10.00 bill, and also that he saw Foster remove a package of "A" gasoline coupons from Mr. Murray's pocket at that time. Smith did not see the money pass between appellant and Murray, and did not see the coupons passed between the men. [Tr. pp. 63 and 64.]

Jona H. Taylor, a Government witness, testified that he was a legal investigator for the OPA; that he saw Murray and appellant together on the day of appellant's arrest, and that he saw Mr. Foster, another investigator at the office of Price Administration, take the two bills from appellant's pocket at that time. Taylor testified that

he had not seen anything pass between the two men at that time. [Tr. pp. 63 and 64.]

John E. Foster, a Government witness, testified that he was an investigator for the OPA; that he arrested appellant on June 2, 1943, in front of the Kenwood Arms Apartments on West Adams boulevard, in the City of Los Angeles, where appellant was in company with the witness Murray; that he searched appellant and found a \$20.00 bill and a \$10.00 bill which he had punched earlier in the morning for the purpose of identification; that at the same time he took a bunch of coupons from Murray's pocket; that he did not have a search warrant at that time, nor did he have a warrant for appellant's arrest; that he was not an FBI agent, nor a U. S. Marshal, nor a Deputy Marshal, and that he was neither a City Police Officer nor a County Police Officer. [Tr. pp. 64 and 65.]

At the close of the Government's case appellant moved the Court for a directed verdict of not guilty on both counts of the indictment. These motions were denied, and an exception to the Court's ruling allowed. [Tr. p. 66.]

The appellant did not take the stand in his behalf, but called five witnesses, all of whom testified that they had known the defendant for many years; that his reputation for truth, honesty, and integrity was good. [Tr. p. 66.]

After the evidence was closed, appellant moved the Court for a directed verdict of acquittal. This motion was denied by the Court and an exception to the Court's ruling allowed. [Tr. p. 66.]

Questions Presented.

As to the property alleged to have been embezzled by appellant, *viz.*, the 250 "A" gasoline coupons referred to in the indictment, the only evidence adduced by the Government was the testimony of Murray to the effect that "A" gasoline coupons were delivered to him by appellant, and the coupons themselves which were admitted in evidence. [Tr. pp. 47 to 62, incl.] No attempt was made by the Government to prove that these particular coupons were the property of the United States; that the appellant knew them to be the property of the United States, and that they had come into appellant's possession in the regular course of his official duty as Chairman of the War Price and Rationing Board, or, in other words, that they had been entrusted to the appellant or had come into his possession lawfully. Thus the first questions presented are:

Was the evidence adduced by the Government sufficient to prove beyond a reasonable doubt that the property alleged to have been embezzled by the appellant was the property of the United States?

Was the evidence adduced by the Government sufficient to prove beyond a reasonable doubt that the property alleged to have been embezzled had come into the possession of appellant in the regular course of his official duty as Chairman of the War Price and Rationing Board; in other words, that it had been entrusted to the appellant, or had come lawfully into his possession?

We take the position, of course, that ownership in the United States of the property alleged to have been embezzled, appellant's knowledge that the property was the property of the United States, and possession of the property by appellant in the regular course of his official duty as Chairman of the War Price and Rationing Board, were necessary elements of the offense charged against him in the indictment, and in order to warrant a verdict of guilty herein, each of such elements should have been proved beyond a reasonable doubt; and we contend that the record is devoid of any evidence whatsoever tending to prove these elements, or any of them.

The evidence offered by the Government tending to show purported similar offenses committed by appellant and not charged against him in the indictment was received upon the theory that the Government was entitled to show similar embezzlements for the purpose of proving the intent of the appellant in connection with the offense for which he was on trial. This theory was advanced by the Government as a basis for the admission of such testimony and was concurred in by the trial court. Emphasizing the reason for its ruling in this connection, the Court instructed the jury that such evidence was to be considered on the question of appellant's intent in the commission of the offense charged against him in the indictment. The next question presented, then, is:

Under the circumstances of this case, did the trial court err in admitting in evidence testimony as to the purported similar offenses alleged to have been

committed by the appellant, for the purpose of proving appellant's intent in connection with the offense with which he was charged in the indictment?

Since the evidence adduced on behalf of the Government showed that appellant had transferred gasoline coupons to the witness Murray and had received money therefor, and assuming that all of the other elements of the offense of embezzlement were proved, there could be no question then as to the intent with which the act was done; and it was, therefore, improper to permit the introduction of evidence of other purported offenses, since it is only where the intent is ambiguous or equivocal that proof of similar offenses is permitted for the purpose of proving the intent with which the act charged against the defendant is done.

Specification of Errors.

I.

The District Court erred in denying appellant's motions that the jury be directed to return a verdict of not guilty in favor of the defendant as to the count upon which appellant was convicted, since there was no evidence to sustain a conviction of appellant upon the charge of embezzlement:

A. There was no sufficient proof that the coupons alleged to have been embezzled were the property of the United States.

B. There was no sufficient proof that appellant knew the coupons alleged to have been embezzled were the property of the United States.

C. There was no sufficient proof that the coupons alleged to have been embezzled had come into the possession of appellant in the regular course of his official duty as chairman of the War Price and Rationing Board.

II.

The District Court erred in overruling appellant's objections to the questions propounded to the witness Murray seeking to elicit from him conversations with appellant and the acts and conduct of appellant in connection with the purported transfers and sales of gasoline coupons, all of which conversations and acts and conduct took place prior to the date of the offense of which appellant was convicted and concerned purported offenses not charged against appellant in the indictment herein; said objections being upon the ground that the same were incompetent, irrelevant, and immaterial, had no bearing upon the issues of the case, and were too remote. This testimony is set forth in detail in the appendix attached hereto. [App. pp. 1 to 7.]

ARGUMENT.

I.

The Court Erred in Denying Appellant's Motions That the Jury be Directed to Return a Verdict of Not Guilty in Favor of Defendant as to the Count Upon Which Appellant Was Convicted, Since There Was No Evidence to Sustain a Conviction of Appellant Upon the Charge of Embezzlement.

A. THERE WAS NO SUFFICIENT PROOF THAT THE COUPONS ALLEGED TO HAVE BEEN EMBEZZLED WERE THE PROPERTY OF THE UNITED STATES.

The evidence concerning the 250 "A" gasoline coupons alleged to have been embezzled by appellant is very brief. It consists of the testimony of the witness Murray to the effect that he received those coupons from appellant at the meeting between him and appellant in front of appellant's apartment house [Tr. p. 57]; the testimony of the witnesses Foster, Taylor and Smith that gasoline coupons were taken from appellant's pocket by Foster after appellant and Murray had met on that occasion [Tr. pp. 62 to 65, incl.]; and finally, the gasoline coupons themselves, which were introduced in evidence as Government's Exhibit 10. [Tr. p. 58.]

Nowhere in the record is there any indication of an attempt upon the part of the Government to prove that the coupons were the property of the United States.

The indictment herein charges that on or about the 2nd day of June, 1943, and while the defendant was a

duly appointed, qualified, and acting Chairman of War Price and Rationing Board No. 5-48, he did

“knowingly, wilfully, unlawfully and feloniously embezzle certain property of the United States, to-wit: 250 ‘A’ gasoline rationing coupons * * * which said property had * * * come into the possession of said defendant in the regular course of his official duty as said Chairman of said War Price and Rationing Board, as aforesaid, said defendant then and there well knowing said property to be the property of the United States * * *.” [Tr. pp. 2 and 3.]

The Court instructed the jury that the indictment charged appellant with a violation of Section 100 of Title 18 of the United States Code Annotated, which section provides for the punishment of anyone who “shall embezzle * * * property of the United States * * *.” [Tr. p. 69.]

The Court further instructed the jury that if they entertained a reasonable doubt as to whether or not any one element of the offense as set forth in the charge against appellant was not substantiated by the proof offered by the Government, then it was their duty to acquit the defendant. [Tr. p. 71.]

The Court in its instructions also defined embezzlement as

“the fraudulent appropriation of property by a person to whom it has been entrusted, or into whose hands it has lawfully come.” [Tr. p. 69.]

Moore v. United States, 160 U. S. 268, 40 L. Ed. 422.

The essential elements of the crime of embezzlement are succinctly stated in the case of *Pecole v. Schroeder*, 43 Cal. App. 623, as follows:

1. That defendant was acting in a fiduciary capacity;
2. That he obtained and held the property in such trust capacity;
3. That the property belonged to his principal; and
4. That he converted it to his own use, in violation of his trust.

From the very definition of the crime of embezzlement, it is obvious that the property embezzled must have belonged to some one other than the person charged with the embezzlement, since one can not "fraudulently appropriate" his own property; nor can it be said that property already belonging to a person could be "entrusted" to him by another. In order, therefore, to convict a person of the crime of embezzlement, it is necessary to prove beyond a reasonable doubt that the property belonged to someone other than the accused. That is one of the essential elements of the offense; and in this case it was incumbent, therefore, upon the Government to prove beyond a reasonable doubt that the coupons charged to have been embezzled were the property of the United States.

As we have pointed out, none of the evidence concerning these coupons touched at all upon the subject of their ownership, and there is nothing whatsoever in the record to prove that essential element of the offense. Without this proof appellant could not be guilty of the offense charged.

B. THERE WAS NO SUFFICIENT PROOF THAT APPELLANT KNEW THE COUPONS ALLEGED TO HAVE BEEN EMBEZZLED WERE THE PROPERTY OF THE UNITED STATES.

The indictment charged, as will be noted, not only that the coupons alleged to have been embezzled were the property of the United States, but also that the appellant knew them to be the property of the United States at the time of the alleged embezzlement. [Tr. pp. 2 and 3.]

Such knowledge upon the part of appellant, therefore, was one of the essential elements of the offense of embezzlement necessary to be proved beyond a reasonable doubt by the Government; and in this connection the jury was instructed that if they entertained a reasonable doubt as to whether any one element of the offense charged against appellant was not substantiated by the Government, then it was their duty to acquit appellant.

We call the Court's attention to our summary of the evidence concerning these gasoline coupons, as set forth hereinabove in subdivision A hereof.

If there was no proof that the coupons were the property of the United States, it follows that there can be, and there was, no proof in the record that appellant knew them to be the property of the United States.

Thus it is manifest the government failed to prove another of the essential elements of the offense charged against appellant.

C. THERE WAS NO SUFFICIENT PROOF THAT THE COUPONS ALLEGED TO HAVE BEEN EMBEZZLED HAD COME INTO THE POSSESSION OF APPELLANT IN THE REGULAR COURSE OF HIS OFFICIAL DUTY AS CHAIRMAN OF THE WAR PRICE AND RATIONING BOARD.

As pointed out hereinabove, the indictment charged that the coupons alleged to have been embezzled

“had * * * come into the possession of said defendant in the regular course of his official duty as said Chairman of said War Price Rationing Board, as aforesaid * * *”;

and the indictment was read to the jury in the course of the Court's instructions. [Tr. pp. 2 and 3.]

Possession of the coupons in the manner set forth in the indictment, then, was another essential element of the offense charged against appellant and which the Court instructed the jury would have to be proved beyond a reasonable doubt, or if not, a verdict of acquittal should be returned in favor of appellant. [Tr. p. 71.]

In the crime of embezzlement it is necessary that the accused shall have come into possession of the property embezzled in a fiduciary capacity; and in this case it was necessary to prove the particular fiduciary capacity, namely, that the coupons had come into appellant's possession in the regular course of appellant's duty as chairman of the War Price and Rationing Board.

A glance at the summary of the evidence received in connection with these coupons, as set forth hereinabove

in subdivision A, will immediately disclose that no proof of any kind whatsoever was made as to appellant's having come into the possession of the coupons in any kind of fiduciary capacity, let alone proof that he had come into their possession in the regular course of his official duty as Chairman of the War Price and Ration Board.

In the case of *Moore v. United States*, 160 U. S. 268, 40 L. Ed. 422, *supra*, the indictment charged that the defendant "being then and there an assistant, clerk, or employee in, or connected with, the business or operations of the United States post office in the city of Mobile in the State of Alabama, did embezzle, etc." In discussing the sufficiency of that indictment the Court said:

"For another reason, however, we think the indictment in this case is insufficient. If the words charging the defendant with being an employee of the postoffice be material, then it is clear, under the cases above cited, that it should be averred that the money embezzled came into his possession by virtue of such employment. Unless this be so, the allegation of employment is meaningless and might even be misleading, since the defendant might be held for the property received in a wholly different capacity—such, for instance, as a simple bailee of the government. In the absence of a statutory regulation the authorities upon this subject are practically uniform. Whart. Crim. L. 1942; *Rex v. Snowley*, 4 Car. & P. 390; *Com. v. Simpson*, 9 Met. 138; *People v. Sherman*, 10 Wend. 298, 25 Am. Dec. 563; *Rex v. Prince*, 2 Car. & P. 517; *Rex v. Thorley*, 1 Mood. C. C. 343; *Rex v. Bakewell*, Russ. & R. 35."

And, of course, if an allegation that the property came into his possession by virtue of his employment be required in the indictment, it follows naturally that proof of that element would be necessary to make out the offense.

In the case of *United States v. Allen*, 150 Fed. 152, the defendant, a post office clerk, was charged with embezzlement of money order funds. The indictment failed to allege that the money came into his hands by virtue of his employment. In holding the indictment insufficient because of such failure, the Circuit Court discussed the reasons for requiring such allegations and proof thereof, and also the effect of a failure to plead and prove those facts. The Court said:

“Although this count charges that the defendant was an employe of the post office and that he converted the money order funds of the United States, the property of the United States, it fails to allege that the money came to his hands by virtue of his employment. The mere fact that a person is an employe in one department of a common establishment does not make it embezzlement if he feloniously steals property under the control of another employe of the same establishment, unless the property itself was lawfully placed in his hands and thereafter by him unlawfully converted. An employe of a post office engaged in the distribution of the mails solely, who feloniously steals money out of a drawer in which are kept the money order funds in charge of another clerk, is guilty of larceny, but not of embezzlement; for, although he was an employe of the post office, the money stolen did not come to his possession by virtue of his employment nor with the consent of the

owner, without which there can be no embezzlement. Aside from that fact an acquittal of this charge could not be pleaded in bar to another indictment for the same offense, which charged that this money came into his possession by virtue of his employment and was by him unlawfully converted to his own use."

In support of the portion of the indictment under consideration here, it was incumbent upon the government to prove beyond a reasonable doubt that the coupons alleged to have been embezzled came into appellant's possession in his fiduciary capacity, and in the regular course of his official duty as chairman of the War Price and Rationing Board.

It is true that there was evidence adduced tending to show that appellant was the chairman of the War Price and Rationing Board at the time of the commission of the offense charged [Tr. p. 42], but there is not one word of evidence that these particular coupons came into his possession as such chairman, or in any other fiduciary capacity, or that he had acquired possession thereof in any lawful manner. For aught that appears in the record, these coupons may have been stolen by the appellant; he may have found them on the street, or in any other place; he may even have obtained them from the witness Murray prior to the time they were turned over to the latter by appellant; he might have taken them from the office of another Rationing Board; or he may have acquired them in any one of a variety of ways other than as Chairman of the Rationing Board. Under any of such circumstances, appellant could not have been guilty of the crime of embezzlement, since he had not come into possession of the coupons in the manner alleged in the indictment. The

proof adduced here (assuming that it was proved that the coupons were genuine coupons properly issued by the United States) might support a charge of transferring, or having the possession of gasoline coupons not legally issued to appellant, in which event he could be charged with the commission of a different offense under the law; but such proof is wholly insufficient to prove that essential element of the crime charged, namely, that appellant had come into possession of the coupons in the regular course of his official duty as chairman of the War Price and Rationing Board.

II.

The District Court Erred in Admitting in Evidence, Over the Objection of Appellant Evidence Offered for the Purpose of Proving Other Separate and Distinct Offenses Not Charged in the Indictment.

Over appellant's objection, the witness Murray was permitted to testify as to conversations with appellant and as to the acts and conduct of appellant in connection with the purported transfer and sale of gasoline coupons by appellant to Murray. All of these conversations and all of such acts and conduct of appellant as testified to by Murray took place prior to the date of the offense of which appellant was charged, and concerned purported offenses not charged against appellant in the indictment herein. Appellant's objections were made upon the ground that the evidence was incompetent, irrelevant and immaterial, had no bearing upon the issues of the case, and was too remote. These objections were overruled and exceptions duly taken. The theory upon which such evidence was admitted was that evidence of similar offenses is admissible to prove the intent with which the act charged

was committed; and the Court instructed the jury that such evidence was to be considered only for the purpose of proving appellant's intent concerning the coupons charged to have been embezzled by him.

A. THE EVIDENCE OBJECTED TO WAS NOT ADMISSIBLE
FOR THE PURPOSE OF PROVING INTENT.

Because the testimony of the witness Murray as to the other purported offenses alleged to have been committed by appellant consumed several pages, we have placed it in an appendix to this brief [App. pp. 1 to 7]; but a short summary of that testimony will be of value here in considering this particular point. Murray, who was a whiskey salesman, talked with appellant at the Office of the Rationing Board. [Tr. p. 47; App. p. 1.] He asked appellant for extra coupons, and appellant gave him some out of a sack. [Tr. p. 47; App. p. 1.] Later, when Murray ran out of coupons, he asked appellant for more and appellant told him to get some out of a newspaper which was in appellant's car. This, Murray did. [Tr. pp. 48 and 49; App. p. 2.] On the next occasion of Murray's seeing appellant, the latter told him that he, Murray, could not get any more coupons without cost, and said that if Murray could sell some coupons, he thought he could get him some. Appellant told Murray that the latter would have to pay him \$20.00 per thousand for the coupons, and that anything over that amount Murray could keep. [Tr. p. 50; App. p. 3.] A few days later Murray got some "C" coupons from appellant. [Tr. p. 51; App. p. 3.] About the first of March, Murray asked appellant for more gas coupons, and appellant gave him a thousand gallons of coupons. [Tr. pp. 51 and 52;

App. p. 4.] Later, Murray called appellant on the telephone and said he could sell one thousand gallons of "C" coupons, and pursuant to that conversation Murray and appellant met and appellant told Murray to pick up a newspaper which he, appellant, had placed by a telephone post. Murray picked up 250 "C" coupons in the newspaper. [Tr. p. 53; App. p. 5.] Murray sold these coupons and gave \$20.00 to appellant. [Tr. p. 53; App. p. 5.] At that time appellant told Murray that when Murray called, if he wanted "A" coupons to ask for Ancient Age Whiskey; "B" coupons would be Brown Foreman, and "C" coupons would be Calvert's, and if he wanted one thousand coupons, he was to ask for one case of whiskey. [Tr. p. 54; App. p. 6.] Later, Murray phoned appellant and told him he needed a case of Calvert's, and appellant said O.K. Thereupon, Murray met appellant and received coupons from him, but no money passed. [Tr. p. 55; App. p. 7.] A few days before Murray was arrested he met appellant and appellant gave him a white box containing three thousand gallons of "T" coupons and two thousand gallons of "C" coupons. [Tr. pp. 55 and 56; App. p. 7.] This box and its contents was introduced in evidence as Government's Exhibit 11. [Tr. p. 59; App. p. 7.]

Thus we find that the jury had before it evidence of at least six separate and distinct offenses not charged in the indictment, and concerning which appellant had no notice and no opportunity to prepare a defense. The rule, of course, is too well-settled to require more than stating that evidence of other offenses is not permitted to prove the charge on which the defendant stands accused, except for certain limited purposes. One of these pur-

poses is the intent with which the defendant did the act which constitutes the basis for the charge. In other words, where intent is an issue, proof of similar offenses may be admitted for the purpose of proving that intent. Where, however, intent is not an issue, or where the intent is not ambiguous or doubtful, then the attention of the jury should not be diverted from the main issue, and collateral matters prejudicial to the defendant and evidence of such other similar offenses should not, under such circumstances, be admitted. Here the testimony offered by the government showed that appellant turned over to Murray the 250 "A" gasoline coupons and received \$30.00 therefor. If appellant performed that act in the manner testified to, then it is obvious that there can be no question as to the intent with which it was done. In other words, there is nothing here which would render the intent of appellant in doing the act doubtful, or equivocal. The situation presented is the same as if intent were not an issue in the case, and, under these circumstances, of course, proof of similar offenses is inadmissible.

"For the purpose of proving intent, evidence of other similar offenses is admissible only when the intent accompanying the act is equivocal."

8 *Cal. Jur.* "Criminal Law," p. 64.

In the case of *People v. Byrnes*, 27 Cal. App. 79, the defendant was convicted of the crime of grand larceny. At the trial the Court permitted the introduction of evidence tending to show the commission of other offenses similar to that charged against the defendant. This evidence was admitted upon the theory that it tended to prove the felonious intent with which the defendant committed

the act charged in the indictment. After pointing out that the evidence objected to was insufficient to prove the necessary elements of the purported similar offenses, the Appellate Court held also that it is only where the intent accompanying the act charged is equivocal that evidence of similar offenses for the purpose of showing intent is admissible; and in this connection the Court said:

*“Moreover, as stated, the reception of this character of evidence for the purpose of showing intent, is an exception to the rule and should only be received in cases where the intent accompanying the act is equivocal, or where it otherwise becomes an issue in the trial, as where it is claimed the act was the result of mistake, accident, or inadvertence, where from the nature of the acts constituting the crime with which the accused is charged, proof of its commission carries with it the evidence and conclusive implication of guilty knowledge, there is no occasion for admitting such evidence, and the rule, not the exception, should apply. (People v. Glass, 158 Cal. 654 (112 Pac. 281).) Surely, if a man is captured while making his exit in the night-time through a broken window of a store-room, having in his possession goods of the owner stolen therefrom, and his defense is an *alibi*, no evidence of other like acts committed by him should be required to show the criminal intent with which he committed the act. So in the case at bar, proof of the acts by means whereof Friesz claimed to have lost his property, was of a character which could leave no doubt in the minds of the jurors as to the criminal intent accompanying the act.”* (Italics ours.)

In the case of *Fish v. United States*, 215 Fed. 544, the defendant was convicted of wilfully burning a yacht for

the purpose of collecting insurance thereon. At the trial the Government was permitted to introduce in evidence, over the objection of the defendant, testimony to the effect that during the preceding 14 months an automobile and another yacht owned by defendant had been burned; that both were over-insured; that defendant was heavily in debt and without money, and was in each case the first to discover the fire, but had made no attempt to save the property. In the course of its opinion reversing the case because of the erroneous admission of such evidence of similar offenses, the Circuit Court of Appeals for the First Circuit used the following language:

“A consideration of the evidence that relates strictly to the fire of October 25, 1910, to the second Senta (the charge in the indictment), leads one to the conclusion that the doubtful questions as to which the jury was called upon to determine was not whether the fire was accidentally set, but whether the defendant set it; that, if it were established that the defendant set the fire, *there could be no doubt that the act of setting it was not accidental, but intentional*, and was done for the purpose of prejudicing the underwriters and replenishing the defendant’s depleted and empty pockets.”

* * * * *

“Such being the state of the proof negativing any idea that the fire might be accidental, we are of the opinion that this was not a case where evidence of previous fires should have been received for this purpose. Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and

should be received, if at all, only in a plain case. *People v. Sharp*, 107 N. Y. 427, 469, 14 N. E. 319, 1 Am. St. Rep. 851; *State v. Lapage*, 57 N. H. 245, 295, 24 Am. Rep. 69."

* * * * *

"While there are exceptions to the general rule—that on the trial of a person for one crime evidence that he has been guilty of other crimes is irrelevant—it is not to be understood that any of the exceptions, when rightly applied, go to the extent of sanctioning the idea that a defendant's propensity to commit crime, or to commit crimes of the same sort as the one charged, can be put in evidence to prove him guilty of the particular offense; and that to come within the exceptions there must be some other real connection between the extraneous crime and the crime charged. As said by Judge Dixon in *State v. Raymond*, 53 N. J. Law, 265, 21 Atl. 330:

" 'However reasonable would be the deduction that, when a pocket is picked in a group of persons, of whom only one is addicted to picking pockets, he is the offender, his singularity in this respect could not, under our legal theory, figure as proof of his guilt. There must appear, between the extraneous crime offered in evidence and the crime of which the defendant is accused, some other real connection beyond the allegation that they have both sprung from the same vicious disposition.'

"This is the rule that is generally followed in this country, and that prevails in Massachusetts and in the Federal courts, as will be seen from an examination of the following cases (citing cases)."

On the general subject of the effect of the use of similar offenses for the purpose of proving the main charge

against a defendant, we refer to the case of *Boyd v. United States*, 142 U. S. 450, 35 L. Ed. 1077. In that case the defendants were convicted of the crime of murder. At the trial the Government was permitted to introduce in evidence, over the objection of the defendants, testimony tending to show that the defendants had, on several occasions prior to the commission of the offense charged, committed the crime of robbery. The Supreme Court of the United States held that the introduction of this evidence was erroneous and prejudicial to the rights of the defendants, and in reversing the judgments of conviction, used the following language:

“If the evidence as to crimes committed by the defendants, other than the murder of Dansby, had been limited to the robberies of Rigsby and Taylor, it may be, in view of the peculiar circumstances disclosed by the record, and the specific directions by the court as to the purpose for which the proof of those two robberies might be considered, that the judgment would not be disturbed, although that proof, in the multiplied details of the facts connected with the Rigsby and Taylor robberies, went beyond the objects for which it was allowed by the court. But we are constrained to hold that the evidence as to the Brinson, Mode, and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government

to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. *Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death.*

“Upon a careful scrutiny of the record, we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. *However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.*” (Italics ours.)

The prejudicial effect of the erroneous admission of similar offenses is discussed also in the case of *Hatchet v. United States*, 293 Fed. 1010. There the defendant was convicted of the crime of larceny. The evidence for the Government tended to show that while Mike Bavoul was standing on a streetcar platform in the city of Washington, the defendant and another took from his pocket a pocketbook containing \$95.00; that Hatchet ran, but was pursued and captured. At the trial, over the objection and exception of the defendant, two Government witnesses were permitted to testify that the defendant gave his right name as John Hatchet, and denied that he had

ever been arrested before; that after his fingerprints had been taken the defendant admitted he had been arrested in Philadelphia under a charge of larceny, under the name of John Brown; that a picture of John Brown was taken out of the rogues' gallery, shown to the defendant and he admitted that it was his picture.

In reversing the judgment of the trial court, the upper Court used the following language:

"The foregoing decisions are determinative of the question here. There was no issue as to appellant's identity; he did not testify, and yet the government was permitted to place before the jury evidence tending to show that he was a man with a criminal record. While there may have been, and probably was, competent evidence warranting conviction, it would be going far to say that appellant was not prejudiced by the admission of this incompetent evidence. He was entitled to a fair and impartial trial, and that he could not have, after it was made to appear, through the introduction of incompetent evidence, that his picture adorned the rogues' gallery, in connection with his arrest in Philadelphia for a similar offense; in other words that, with criminal propensities, he had operated elsewhere and under another name." (Italics ours.)

B. THE REQUISITE PROOF OF THE COMMISSION OF THE PURPORTED SIMILAR OFFENSES WAS NOT MET BY THE GOVERNMENT.

The Court instructed the jury that before they could infer guilty intent from the evidence of similar offenses, such offenses and all elements thereof must be established by evidence which is plain, clear, and conclusive. [Tr. p. 70.]

This is simply another method of stating that those offenses, and all the elements thereof, must be proved to the jury's satisfaction beyond a reasonable doubt.

We submit, however, that none of the evidence introduced for the purpose of showing similar offenses alleged to have been committed by appellant measured up to that standard. A glance at the summary of the evidence set forth hereinabove in Subdivision A hereof, or as set forth more in detail in the appendix hereto, will at once make that manifest. No effort was made to prove that the gasoline coupons turned over to Murray by appellant on those occasions were the property of the United States, nor that appellant knew them to be the property of the United States, nor that appellant had received them in a fiduciary capacity as chairman of the War Price and Rationing Board, or that he had received them in any fiduciary capacity. In other words, this evidence was subject to the same objection as the evidence concerning the charge of embezzlement of which appellant was convicted; and it was wholly insufficient for the purpose for which it was offered.

Where, under the pretext of showing intent, evidence of other similar offenses is adduced against the accused, the prosecution "assumes the same burden" as to such other offenses that it is charged with by law in the main case.

People v. Whitman, 114 Cal. 338 at 343;

People v. Bird, 124 Cal. 32 at 34.

The commission of the other offenses must be proved beyond a reasonable doubt.

Haley v. State, 209 S. W. 675 (Texas).

In the case of *People v. Byrnes*, 27 Cal. App. 79, *supra*, the Court held that the evidence introduced for the purpose of proving similar offenses was insufficient to prove the necessary elements of those offenses; and in this connection said:

“That the evidence tended strongly to show that at the times in question defendant was present, engaged in the operation of an unlawful scheme whereby these witnesses were swindled, may be conceded, but the transaction was wholly lacking in the material element existing in the main case, viz., the fraud and deception practiced upon Friesz. ‘When the body of the offense has been established, and that defendant passed the check, and it is sought to show guilty knowledge by the fact *that defendant also passed other forged paper, the prosecution assumes the same burden as to all the other checks introduced. It must show that such checks were forged.*’ *People v. Whiteman*, 114 Cal. 338, 46 Pac. 99; *People v. King*, 23 Cal. App. 259, (137 Pac. 1076); *People v. Bird*, 124 Cal. 32, 56 Pac. 639. *The testimony of Torline and Koehler, wherein they identified defendants as operating a betting exchange or pool-room at Redondo, was insufficient to establish a like offense in that it was wholly lacking in the essential element of deception and fraud required to constitute the crime with which defendant was charged.*” (Italics ours.)

In the case of *Paris v. United States*, 260 Fed. 529, the defendant was charged with unlawfully carrying on the business of dealing with narcotics. At the trial the Government was permitted to introduce in evidence, over the objection of the defendant, testimony to the effect that at a time prior to the time of the act charged in the

indictment, the defendant had been arrested in another city and 20 bottles of morphine had been found in his handbag. There was no evidence introduced that the defendant ever sold any morphine at the other city, and there was no evidence that that transaction was connected in any way with the transaction which formed the basis of the indictment.

In reversing the case and holding that the evidence objected to was incompetent, irrelevant and prejudicial, because it failed to prove any sale of, or dealing in, any narcotics at the other city by the defendant, the Court used the following language:

“The admission of this evidence relative to the Tulsa affair is specified as error, and it is difficult to discover any rule or principle upon which its admission can be sustained.

“The general rule is that evidence of the commission by a defendant of an offense similar to that for the alleged commission of which he is on trial is not admissible to prove his commission of the latter offense. *Boyd v. U. S.*, 142 U. S. 454, 456, 457, 458, 12 Sup. Ct. 292, 35 L. Ed. 1077; *Hall v. United States*, 150 U. S. 76, 81, 82 Sup. Ct. 22, 37 L. Ed. 1003; 16 C. J. 586, 1132. To this general rule there are exceptions. One of them is that, where the criminal intent of the defendant is indispensable to the proof of the offense, proof of his commission of other like offenses at about the same time that he is charged with the commission of the offense for which he is on trial may be received to prove that his act or acts were not innocent or mistaken, but constitute an intentional violation of the law. *In cases falling under such an exception to the rule, however, it is essential to the admissibility of evi-*

dence of another distinct offense that the proof of the latter offense be plain, clear, and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible. Baxter v. State, 91 Ohio St. 167, 110 N. E. 456; State v. Hyde, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191; 16 C. J. 592; People v. Sharp, 107 N. Y. 427, 469; 14 N. E. 319, 1 Am. St. Rep. 851; State v. La Page, 57 N. H. 245, 259, 24 Am. St. Rep. 69; Fish v. United States, 215 Fed. 545, 549, 132 C. C. A. 56, L. R. A. 1915A, 809. Such evidence tends to draw the attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions, and to lead them unconsciously to render their verdict in accordance with their views on false issues rather than on the true issues on trial.” (Italics ours.)

In the case of *Gart v. United States*, 294 Fed. 66, the defendant was convicted of a violation of the Harrison Narcotic Act. The evidence in support of the charge of unlawful sale of narcotics tended to show that a delivery of the drug was made upon a street in the city of Denver. Evidence was introduced by the Government which tended to show that at a different time and place upon a street in Denver, the defendant delivered a package to another party. The objection of the defendant to that evidence was overruled. The Government failed to prove by any testimony what the package so delivered contained. In the course of its opinion reversing the case, the Circuit Court of Appeals for the Eighth Circuit used the following language:

“It must be apparent that such a line of testimony if not properly admissible would be highly

prejudicial. Standing as evidence before the jury, it might easily lead them to the conclusion that the defendant was in the habit of making sales of narcotics on the streets by delivering packages containing the drug to persons indiscriminately, and yet there was no proof that the package so testified as having been delivered by the defendant at a time and place not charged in the indictment contained narcotic drugs. This left the matter in the nature of a mere suspicious circumstance, which not having been taken from the jury by the trial court left it with them for consideration.

“The scope and purpose of testimony concerning similar offenses is limited, as has been laid down in the Supreme Court of the United States in the cases of *Boyd v. United States*, 142 U. S. 454, 12 Sup. Ct. 292, 35 L. Ed. 1077, and *Hall v. United States*, 150 U. S. 76, 14 Sup. Ct. 22, 27 L. Ed. 1003. *Only in exceptional cases is the proof of such transactions admissible. Where a case falls within the exception, the proof must be clear and convincing* It will be unnecessary to discuss the point in this case as to whether or not this line of testimony fell within the exception to the general rule governing the proof of similar offenses, for the reason that in the case at bar we have no proof of an offense, but merely proof of a suspicious circumstance. (Italics ours.)

The Court then stated that the rule which should apply to this case is the one stated in the case of *Paris v. United States*, 260 Fed. 529 at page 531, *supra*, to which reference is hereby made.

In the case of *MacLafferty v. United States*, 77 Fed. (2d) 715, a case decided by this Court, the defendant

was convicted of the sale of laudanum, in violation of the Harrison-Anti-Narcotic Act. At the trial of the case the Government was permitted to introduce in evidence, over objection of the defendant, testimony to the effect that the defendant had issued eight other prescriptions for laudanum. The defendant testified that the persons to whom these prescriptions had been issued was being treated by the defendant for a case of ear trouble, and the prescriptions had been issued in the treatment of the disease. The defendant requested an instruction to the effect that the Government must establish beyond a reasonable doubt that the acts of the defendant in issuing the prescriptions other than those charged in the indictment were criminal. This instruction was refused by the Court, but the Court did instruct the jury that the testimony as to the other prescriptions was admissible as bearing upon the intent with which the prescription mentioned in the indictment had been issued.

In reversing the case and holding that the trial court should have given the requested instruction, this Court held that it was necessary for the Government to show that the other prescriptions were connected with actual violations of the law, and in this connection the Court said:

“In view of the fact that all the physicians who testified stated that the prescriptions were proper in treatment for ear trouble; that there was no evidence that Jack Wilson was not a bona fide patient suffering with ear trouble or any showing that he had not been treated for ear trouble by appellant as testified to by him, this case was not in line with those authorities which hold that it is proper to allow evidence of other crimes to establish intent.

"We hold that before the evidence in relation to these prescriptions other than the ones described in the indictment could be admitted in evidence it was necessary for the government to show that such other prescriptions or sales were connected with actual violations of the law. The rule to be applied in such cases is set forth in Coulston v. United States (C. C. A. 10), 51 F. (2d) 178, at page 180, cited by appellee, where the court speaks as follows:

" 'In the civil law, and very early in the common law, evidence of other crimes was admitted on the theory that a person who has committed one crime is apt to commit another. The inference is so slight, the unfairness to the defendant so manifest, the difficulty and delay attendant upon trying several cases at one time so great, and the confusion of the jury so likely, that for more than two hundred years it has been the rule that evidence of other crimes is not admissible. Boyd v. United States, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077; Hall v. United States, 150 U. S. 76, 14 S. Ct. 22, 27 L. Ed. 1003; Niederluecke v. United States (C. C. A. 8), 21 F. (2d) 511; Cuccia v. United States (C. C. A. 5), 17 F. (2d) 86; Smith v. United States (C. C. A. 9), 10 F. (2d) 787; Wigmore on Evidence (2d Ed.) 194. Corpus Juris cites cases from forty-four American jurisdictions in support of this rule. 16 C. J. 586. There are many exceptions to the rule, the most common of which is that, if the prosecution must show a specific intent, evidence of other similar offenses may be used to establish that fact.'

"The particular exceptions here under discussion are noted in Paris v. United States (C. C. A. 8), 260 F. 529, at page 531, where the court, after citing some of the authorities set forth above, declared:

* * * To this general rule there are exceptions. One of them is that, where the criminal intent of the defendant is indispensable to the proof of the offense, proof of his commission of other like offenses at about the same time that he is charged with the commission of the offense for which he is on trial may be received to prove that his act or acts were not innocent or mistaken, but constitute an intentional violation of the law. *In cases falling under such an exception to the rule, however, it is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear, and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible.*” (Cases cited.) (Italics ours.)

Conclusion.

To recapitulate: the Government failed to make out a case of embezzlement against appellant because it failed to prove beyond a reasonable doubt, or at all, at least three of the essential elements of the offense charged against appellant. These elements were:

1. Ownership in the United States of the particular coupons alleged to have been embezzled;
2. Knowledge upon the part of appellant of such ownership in the United States; and
3. Possession by appellant in his fiduciary capacity as chairman of the War Price and Rationing Board, of the particular coupons alleged to have been embezzled.

In other words, the Government failed to establish even the *corpus delicti* of the offense charged.

In addition, the substantial rights of the appellant were further prejudiced by the erroneous admission of the evidence of purported similar offenses in a case where such evidence was inadmissible under the exceptions to the general rule excluding such offenses, and where such offenses were not properly or sufficiently proved.

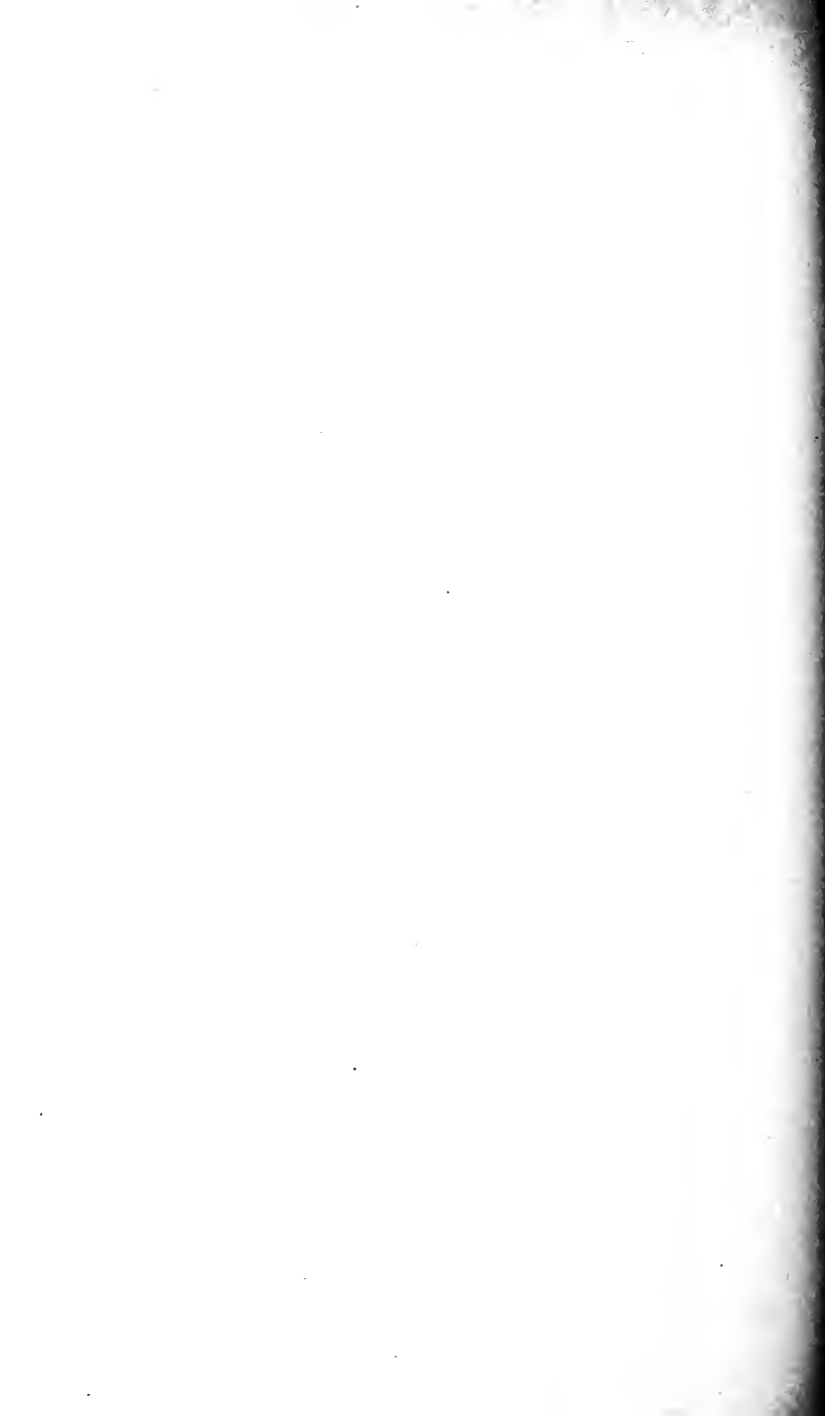
For the foregoing reasons, we submit that the judgment of the District Court appealed from should be reversed.

Respectfully submitted,

AMES PETERSON,

WILLIAM B. BEIRNE,

Attorneys for Appellant.



APPENDIX.

Testimony of Government Witness James P. Murray as to Purported Similar Offenses.

At the time when I saw Mr. Henderson at 1979 S. Vermont Avenue, I was a whiskey salesman, and I went out to get my "C" book. I had a conversation with him.

By Mr. Norcop: Q. Tell the jury what was said and done by—

Mr. Cannon: Objected to as immaterial, having no issue in the case, too remote.

The Court: Overruled.

Mr. Cannon: Exception.

The Witness (continuing): I told Mr. Henderson that I had an "A" book and I was applying for my "C" book in order to get enough gasoline to run both jobs that I was working at, and I asked Mr. Henderson if I could get some coupons enough to run me on until I could get my "C" book. He had a paper sack down there at the end of the desk and he reached in and gave me a few coupons and said, "I think this will run you until you can get the book through." [Tr. p. 47.]

Later when I ran out of tickets I went back and asked him if I could get some more, and I had a conversation with Mr. Henderson on the sidewalk in front of the rationing board.

Q. Give us the conversation.

Mr. Cannon: If the court please, I object on the ground that it is immaterial and has no bearing on the issues in this case, and particularly on the ground that it is too remote.

The Court: Overruled.

Mr. Cannon: Exception. If the court please, without having to interrupt each time on these various conversations, may it be understood without my making specific objections to each portion of the testimony of the witness having to do with this conversation, that I have a running objection to the entire conversation.

The Court: As far as this conversation is concerned, it is satisfactory to the court, if it is agreeable to Mr. Norcop.

Mr. Norcop: That is agreeable, Your Honor.

The Court: Very well.

Mr. Peterson: The same exception taken or noted as though verbally stated.

The Court: That is understood.

Mr. Norcop: So stipulated.

The Witness: I asked Mr. Henderson at that time if I could get any more tickets, that I was about to run out, and I wanted some more to make a trip up to Bakersfield, and he says, "I will give you a few more." He said, "If you go out there in my car, it is parked on a lot, there are some folded up in a newspaper, and they are sticking on the inside of the door handle on the left hand side there where the steering wheel is." And I went out. I said "Which car is it?" And he pointed it out, and I went out there and found this newspaper and some tickets inside the newspaper, that is, separate tickets, they wasn't all in sheets, just torn up.

Q. By Mr. Norcop: What do you mean by tickets?

A. I mean coupons, gas rationing coupons, "A" coupons.

Q. Did you take them? A. Yes, sir. [Tr. pp. 48 and 49.]

The Witness (continuing): The next time I had a conversation with Mr. Henderson concerning gas coupons was on January 30, 1943, at the ration board. Just he and I present. [Tr. p. 49.]

Q. Tell us everything that was said and done. A. He asked me if I could get him some Calvert whiskey—

Mr. Cannon: Just a minute. I object on the ground it has no bearing on the issue in the case, immaterial, and too remote.

The Court: Overruled.

Mr. Cannon: Exception. May I have a running objection to this conversation, and may it be deemed to be overruled and an exception taken?

The Court: It is agreeable to the court.

Mr. Norcop: So stipulated. [Tr. pp. 49-50.]

The Witness (continuing): At that particular time? He told me that that I couldn't get any more tickets without a cost to me. He said friendship would go a long way, but we just can't continue this. He said, "If you could sell some tickets I think I would be able to get you some." I said, "What do you ask for them? How much do I have to get for them? I never have tried to sell any."

Q. That is what you said to him? A. Yes, sir. And he said I can sell them for \$20 a thousand. That is, I would have to pay him that for them. And all over the \$20 I got out of it, it was up to me to keep.

Q. That is what he said: A. Yes, sir. [Tr. p. 50.]

The Witness (continuing): I went back to the Board a few days later than that; he left me some "C" coupons at that time. [Tr. p. 51.]

By Mr. Norcop: You were going to direct me to a conversation or a meeting that you had with Mr. Henderson subsequent to that date? A. Yes, when I got the first—

Q. The approximate time, fix it any way you want. A. Well, the ones he gave me then ran me up until February, with the coupons that I had in my book, they ran me up until around February.

Q. All right. A. Then along about the first of March I asked him for some more tickets, and then he gave me the thousand gallons of tickets.

Q. Where were you, then, on this date, this occasion on the first of March?

The Court: Can you just as well say "coupons" if you mean coupons?

The Witness: I will try to to remember that, Your Honor. That is what I mean, coupons, gas coupons.

The Witness (continuing): About the 1st of March I called Mr. Henderson and told him I thought I could sell one thousand. I called him up at his home. I recognized his voice.

Mr. Cannon: I object to the conversation on the ground that it is immaterial and has no bearing on the issues in this case; does not tend to prove any issue in this case.

The Court: It is overruled.

Mr. Cannon: Exception.

The Witness: Well, I called him and told him I thought I could sell one thousand gallons of "C" coupons that he asked me about. And he asked me where I was and I told him to meet me on the corner of Hoover

and 36th Street, and in about 20 minutes he came down alone. He walked up east on 36th Street and he had a newspaper in his hand and let the newspaper down on the telegraph post and told me to go over there and pick it up, and I went over and picked it up and there was 250 "C" coupons in this paper. And I told him that the man was waiting out there at the gas station and I would be over to the rationing board and give it to him as soon as I could contact this man. And he said, "Well, call when you get over there." And I went over there as soon as I made the delivery of the tickets. I sold them to Mr. Hubler for \$40.00. I called Mr. Henderson at the rationing board and talked to him over the telephone. I recognized his voice and I said, "Come over to the lot there."

Mr. Cannon: I object to the question on the ground that it is immaterial, that it has no bearing on the issues in this case.

The Court: Overruled.

Mr. Cannon: Exception.

The Witness (continuing): I went over to the lot and sat down in his car and he came over in a few minutes and I gave him \$20.00.

By Mr. Norcop: Q. Did you have any further conversation over there in his car?

Mr. Cannon: May my same objection go that it is immaterial, has no bearing on the issues in this case?

The Court: It may be so considered. Is this offered for the purpose of intent, showing these other matters, Mr. Norcop?

Mr. Norcop: Yes. For the purpose of showing intent.

Mr. Cannon: It is understood too that it has been offered and received over my objection, and an adverse ruling by the court and an exception to that ruling.

The Court: That is true.

By Mr. Norcop: Q. Mr. Murray, had you finished relating the conversation? A. No, sir, I hadn't.

Mr. Norcop: Have you got your objection in that you wanted, Mr. Cannon?

Mr. Cannon: Yes.

The Witness (continuing): The defendant said that in the future whenever we contacted each other, it should not be done around the Board. He said, "When you call, if you want 'A' tickets, call for Ancient Age Whiskey, and 'B' tickets would be Brown Foreman, and 'C' tickets would be Calverts." And if I was to want one thousand coupons I would ask for 1 case of whiskey. I saw him practically every week. [Tr. pp. 51 to 54.]

The Witness (continuing): I had a telephone conversation with the defendant before I met him at Jefferson and Crenshaw.

Q. What was the subject of the telephone conversation?

Mr. Cannon: Objected to on the ground that it is immaterial and has no bearing on the issues in this case.

The Court: Overruled.

Mr. Cannon: Exception.

The Witness (continuing): I told him I needed a case of Calverts and he said O.K. So we met at Jefferson and Crenshaw after the 'phone call.

Mr. Peterson: As to that conversation, the same objection heretofore made.

The Court: The same ruling.

Mr. Peterson: Save an exception.

A. I asked him to get me a "C" book. There was no money passed at that time. The book that you show me looks like the one that was in the can. (This was marked for identification.) I again saw him just a couple of days before I was arrested, and he gave me a little white box with three thousand "T" coupons and two thousand gallons of "C" coupons.

By Mr. Norcop: Tell the jury all that you said and all that he said and all that was done there.

Mr. Cannon: Objected to on the ground that it has no bearing on the issues of the case, and it is incompetent.

The Court: Overruled.

Mr. Cannon: Exception.

A. He told me he was going on a fishing trip and would leave me some coupons for sale, in the event I needed them. [Tr. pp. 55-56.]

By Mr. Norcop: Q. I now show you a little paste-board box and ask you if that is the box you had referred to in your testimony before the lunch hour. A. It is the one that Mr. Henderson gave me just before going to Arrowhead.

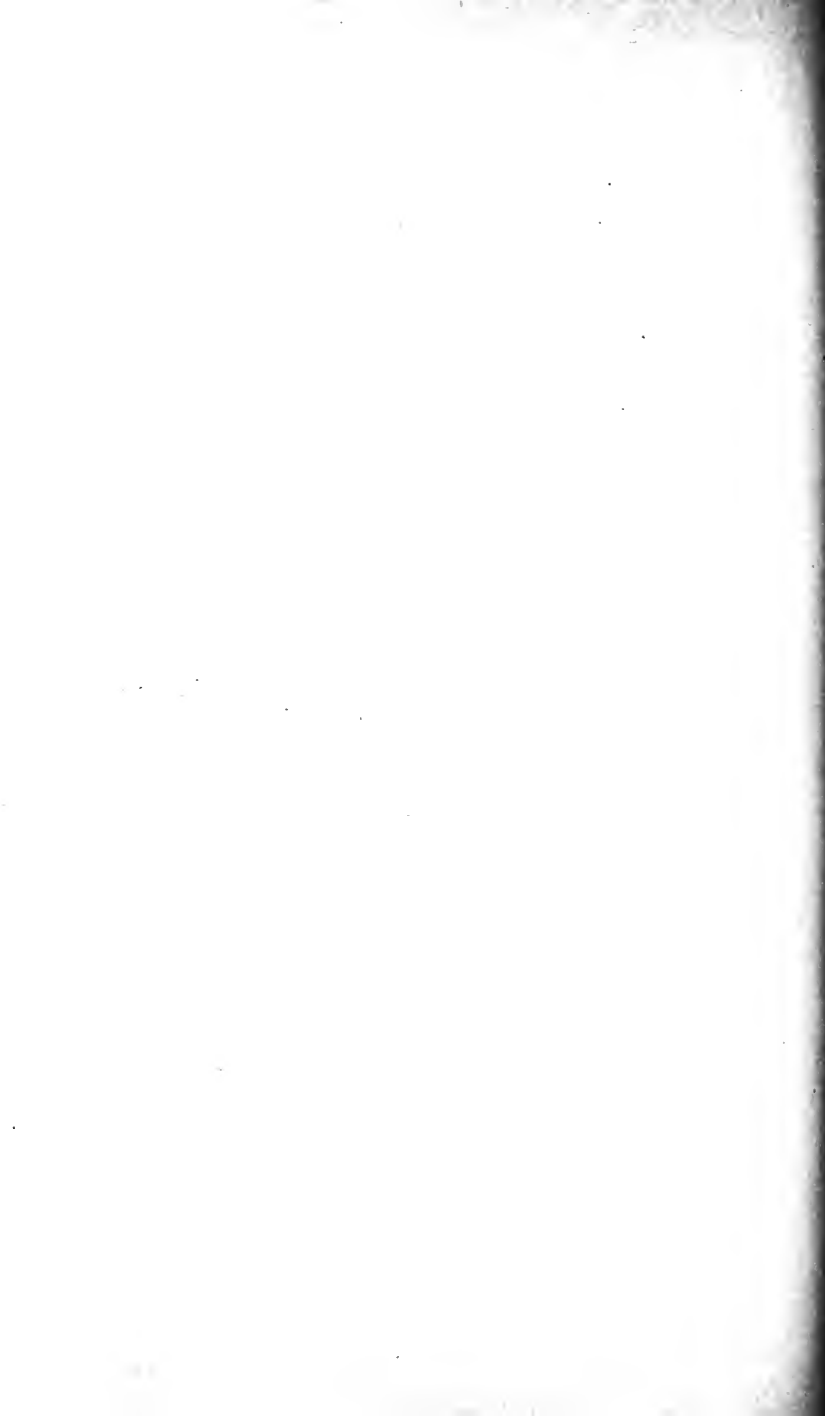
Mr. Norcop: We offer this package in evidence with its contents.

Mr. Peterson: It is objected to on the ground that it is no part of the transaction for which the defendant is on trial. It is too remote and has no bearing on the issues set forth in the indictment.

The Court: Overruled.

Mr. Peterson: An exception.

(Whereupon package and contents referred to were received in evidence as Government's Exhibit 11.)



No. 10519 Cr.

IN THE

7
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATHANIEL WINSTON HENDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S OPENING BRIEF.

CHARLES H. CARR,

United States Attorney,

FILED

JAMES M. CARTER,

Assistant United States Attorney,

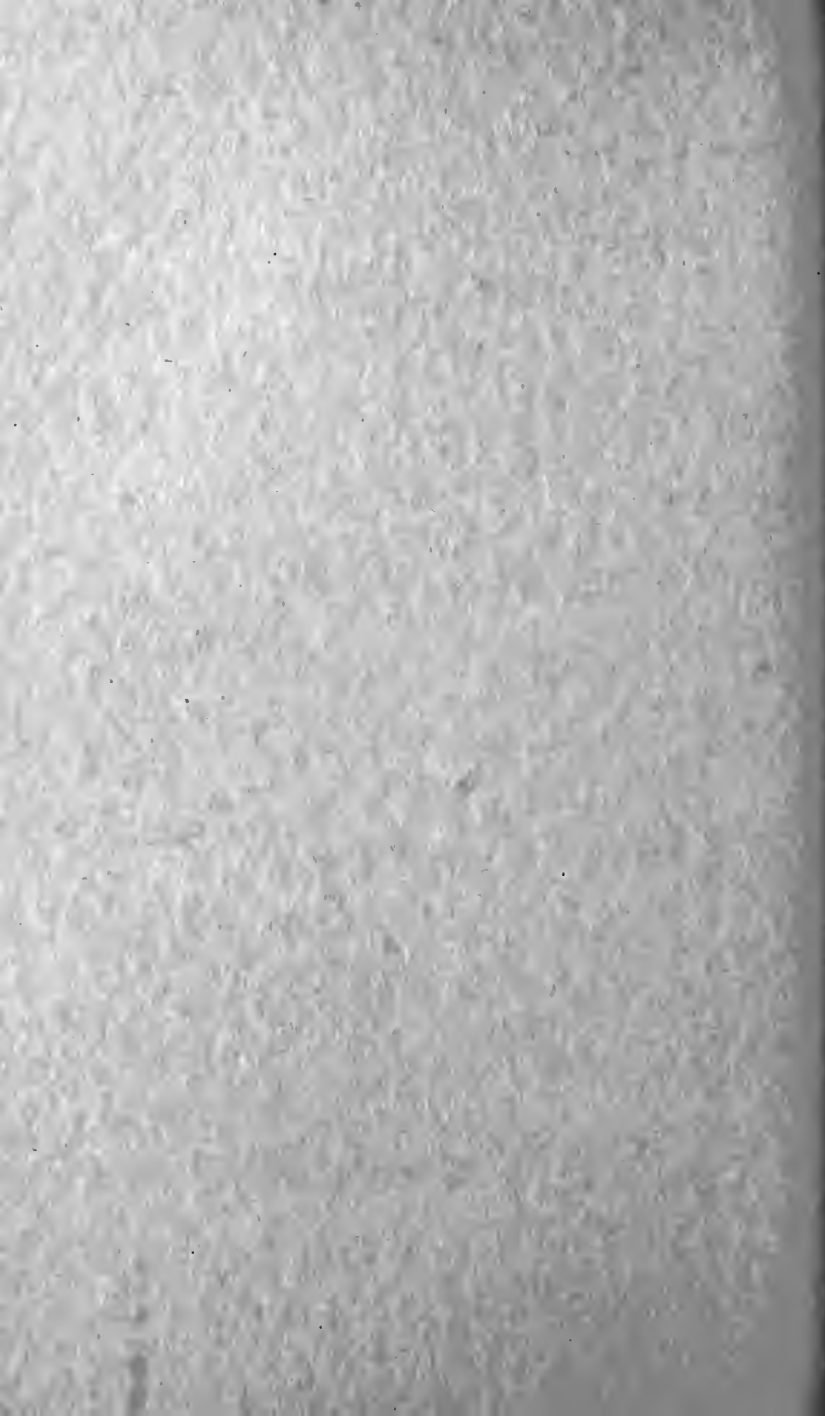
FEB 23 1944

PAUL P. O'BRIEN, V. P. LUCAS,

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Attorneys for Appellee.



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3. Whether or not the coupons came into possession of the defendant in his official capacity as Chairman of the War Price and Rationing Board.

4. Whether or not the property alleged to have been embezzled had been entrusted to the defendant and was lawfully in his possession.

5. And whether or not, under the circumstances of the case, the trial court erred in admitting evidence as to the commission by the defendant, of other offenses for the purpose of proving the defendant's intent in connection with the offense charged in the indictment.

It is the position of the Government that the only question that can possibly be presented on this appeal is the last named one, that having to do with the admission of evidence or other offenses. In fact, adherence to the rules of this Circuit preclude even this last point being raised.

III.

Objections of Appellee to Appellant's Specification of Errors.

On page 9 of the appellant's brief, there is a so-called specification of errors which in no way follows the Assignment of Errors as contained in the transcript of record on page 77 thereof. Appellee contends that Rule 11 of the Rules of the Circuit has not been complied with by the appellant in taking this appeal.

Rule 11, of this Circuit has been in existence long enough so that the Bar should be sufficiently acquainted with its contents and this Circuit has on many occasions in the past insisted upon its observance.

The Assignments of Error, found on page 77 of the transcript of record are as follows:

I.

"That the Circuit erred in refusing to direct the jury to bring in a verdict of Not Guilty as to each Count in the Indictment at the close of the Government's case in chief."

II.

"That the Court erred in refusing to direct the jury to bring in a verdict of Not Guilty as to each Count in the Indictment at the conclusion of all of the testimony and evidence in the case."

III.

"That the Court erred in allowing in evidence testimony concerning offenses other than those set forth in the Indictment upon which the defendant was on trial."

Rule 11, of the Circuit requires "the full substance of evidence admitted or rejected" to be contained in the assignments and on this appeal there has not been the slightest attempt to comply with this rule.

In the case of *Muyres v. United States*, 89 F. (2d) 783 (9th Cir.), this court said as follows:

"There are four assignments of error. Assignment 1, is to the admission of evidence. It does not quote the full substance of the evidence admitted as required by our Rule 11, and is therefore disregarded."

A somewhat similar situation was before the court in the case of

Girson v. United States, 88 Fed. (2d) 358, (9th Cir.),

where the court said:

“Appellants, under one point, contend that the court erred in permitting the witness Haines to testify as to the alleged shortages of clothing supplies and blankets at Fort Missoula. Appellants argue that this point is raised by assignments 11, 12, 13 and 16. We cannot consider assignment 11 and 16 because they do not comply with Rule 11 of this court, requiring the quotation of ‘the full substance of the evidence admitted or rejected.’ This rule as interpreted by *Goldstein v. United States* (C. C. A. 9), 73 Fed. (2d) 804, and *Mullaney v. United States* (C. C. A. 9), 82 Fed. (2d) 638, requires that the objection, grounds therefor, the ruling of the court and the exception thereto must be stated in the assignment of error.”

Turning now to *Mullaney v. United States* (*supra*), we find that the court said as follows:

“Assignments of error numbered 23 to 27, both inclusive, and number 30, relating to the admission and rejection of evidence, do not show the objections to such evidence, the grounds thereof, nor exceptions to the rulings of the court. This court has held that such assignments do not comply to Rule 11 of this court and therefore we will not consider them.”

Having in mind the foregoing authorities and the consistent attitude of this court for many years, the appellee does not believe it necessary to answer any of the con-

tentions set forth on pages 9 to 18, inclusive, of appellant's brief. The insistence of the court of compliance with Rule 11 would preclude the appellant from even having this court consider Assignment No. 3 of the assignment of errors which point is discussed on page 19 of appellant's opening brief.

However, since this court has the inherent right to take notice of prejudicial error whether it is assigned or not, the question of the admission of evidence of other offenses will be treated in this brief and the authorities of the appellant will be discussed and analyzed, without waiving the objection of appellee that the assignment does not comply with the rule. In presenting this assignment the appellant has not differentiated between evidence touching upon facts which of themselves constitute some legal offense, and facts which prove the commission of an exactly similar offense. Court decisions are often loosely worded in this regard and speak of "evidence of similar offenses" which, as a matter of fact, if the record is examined the evidence may only show conduct of a general nature which might or might not amount to a similar offense, or the evidence may show a precisely similar legal offense utterly remote both as to time, place and circumstances from the offense for which the defendant is being tried. It is the realization of this situation by the courts which has prompted them to pronounce the rule that whether or not evidence of this character is admissible is to be determined by the facts and circumstances in each case, and that it is primarily a question for the trial judge to determine and that unless the error is clearly demonstrated the Appellate Court will not override and reverse the action of the trial court.

Appellee insists that an examination of the record discloses that the trial court permitted, over the objection of the defendant, the witness Murray to testify to his course of conduct with the defendant covering a period of three or four months. The witness Murray testified that he told the defendant the very first time he met him that he needed some additional ration coupons. [Tr. p. 47.] At that time defendant reached down at the end of his desk and gave him a few coupons; that later on he received his "C" book and used up its contents, and went back and asked the defendant for additional coupons, stating that he needed them for a trip to Bakersfield, California [Tr. p. 48], at which time the defendant told the witness to go out and he would find some in the car of the defendant. [Tr. p. 49.]

The record shows that the next contact between the witness and defendant was around the 30th of January, 1943, when they met outside of the headquarters of the Ration Board and that the defendant told the witness Murray that if he got any more coupons he would have to buy them, and also suggested that the witness might be able to sell coupons. [Tr. p. 50.] The record does not show any completed transaction at this point, but only a discussion of the possibilities of the situation. A few days later the witness called the defendant and told him that he thought he could sell one thousand coupons. This was approximately the first part of March [Tr. p. 52], and that as the result of this conversation he met the defendant and actually purchased 250 "C" coupons for which he paid the defendant \$20.00. [Tr. p. 53.]

Testimony further shows another meeting had subsequent to a telephone conversation [Tr. p. 55] when a sale of "C" coupons and "T" coupons was completed. Shortly after this last mentioned transaction the witness was arrested by the OPA investigators. After his arrest the arrangement was made between the investigators and the witness, for the witness to contact the defendant and arrange for the purchase of further coupons, and it is this last transaction for which the defendant stood trial.

It is the position of the appellee that it does not make any particular difference whether these instances referred to in the record constitute past completed offenses, or whether or not, as contended by appellant, evidence of this character must show "that the proof of the latter offense must be plain, clear, and conclusive." The instances complained of by appellant show a chain of connected acts between the defendant and the witness limited in point of time to their immediate conduct for a period of three months, and each particular act complained of shows that the defendant was misusing the coupons under his charge, namely in some instance giving them away without pecuniary gain and in others making an outright sale. This evidence shows plan, scheme, design, and was admissible in evidence as tending to prove the particular intent existing in the mind of the defendant at the time of the commission of the offense for which he stood trial.

After analyzing the cases cited by appellant in support of his view of the law, appellee will cite and quote from cases which clearly and succinctly support the action of the trial court in admitting this evidence.

IV.

Analysis of Cases Cited by Appellant.

In cases such as this, it is difficult, if not impossible to lay down any hard and fast rule which will be applicable in all circumstances. Such fact was specifically commented upon in the case of

Fish v. United States, 215 Fed. 544;

cited and quoted from in appellant's brief. The court said as follows:

"While there are exceptions to the general rule—that on the trial of a person for one crime evidence that he has been guilty of another crime is irrelevant—it is not to be understood that any of the exceptions, when rightfully applied, go to the extent of sanctioning the idea that a defendant's propensity to commit crime, or to commit crimes of the same sort as the one charged, can be put in evidence to prove him guilty of the particular offense; and that to come within the exceptions there must be some other real connection between the extraneous crime and the crime charged."

The above quotation clearly points out the principle and the exceptions, and appellee believes that the facts in the instant case come within the exceptions. In other words, the evidence objected to by the defendant was limited to the particular witness who testified to the offense charged in the indictment, and related to a course of conduct covering a period of several weeks.

There is no similarity between the facts in this case and in the case of *Fish v. United States*, used by appellant in his opening brief.

At page 26 of appellant's brief, the case of *Boyd v. United States*, 142 U. S. 450, is cited and quoted from.

This old case is probably one which is most used by appellants when raising the question of the admissibility of similar offenses. The case is a very respectable authority when cited under circumstances which justify the use of the language of the decision, but it can not be indiscriminately used as supporting the contention of a defendant in every kind of trial and regardless of circumstances.

The *Boyd* case was a murder charge, the murder being committed in the perpetration of a robbery. At the trial, over the objection of the defendant, the Government introduced evidence of the robbery of at least three other persons at a time considerably prior to the robbery in which the murder was committed, and in speaking of this circumstance in the trial the Supreme Court said:

“The principal assignments of error relate to the admission against the objection of the defendants, of evidence as to several robberies committed prior to the day when Dansby was shot, and which, or some of which at least, had no necessary connection with, and did not, in the slightest degree, elucidate the issue before the jury, namely, whether the defendants murdered John Dansby on the occasion of the conflict at the ferry.”

In the above quotation we find the real principle on which evidence of other crimes is admitted, namely, is the other crime connected with the commission of the crime charged in the indictment or would it to some degree explain the issue which the jury is called upon to decide? Further along in the opinion, the court said as follows:

“If the evidence as to crimes committed by the defendants, other than the murder of Dansby, had been limited to the robbery of Rigsby and Taylor, it may

be, in view of the peculiar circumstances disclosed by the record, and the specific directions by the court as to the purpose for which the proof of those two robberies might be considered, that the judgment would not be disturbed * * *."

We call the attention of the court to the above language wherein the Supreme Court recognizes that evidence of other robberies by the defendants might be admissible, due to the peculiar circumstances disclosed by the record, and that if the evidence had been limited to these particular robberies, the court might not have seen fit to disturb it. The circumstances of each case are the controlling factors in determining the admissibility of evidence of similar offenses, and no predetermined rule can be laid down as controlling in all cases.

The next case referred to by appellant in his brief is that of *Hatchet v. United States*, 293 Fed. 1010, and we are at loss to understand why this case was cited at all, because by no stretch of the imagination could it be considered as stating anything other than the well known principle against the admission of evidence concerning other crimes without in any way whatever referring to the many exceptions to that rule.

The facts in the *Hatchet* case were as follows: The defendant upon being arrested by police officers for the crime of larceny, was asked by two police officers if he had been previously arrested and upon his denial of any previous arrest, they thereafter confronted him with a photograph and certain other evidence, whereupon he admitted a prior arrest and conviction. This testimony was permitted to be elicited from the officers over the objection of the defendant. Of course, such evidence was

clearly inadmissible because there was no question of identity of the defendant before the court and the admission of such evidence was highly prejudicial because it was wholly independent of the commission of the crime for which the defendant stood charged.

The case of *Parris v. United States*, 260 Fed. 529, cited and also quoted in appellant's brief is not such a case as will support the position of the defendant on this appeal. That was a case wherein the defendant and his wife were arrested in Oklahoma City on a charge of illegally possessing morphine and other narcotics, and at the trial of the case, over the objection of the defendants, evidence was permitted to be introduced to the effect that approximately a year previous at Tulsa, Oklahoma, the defendants were arrested and found to be in possession of morphine and other narcotics. In discussing the error committed by the Court in the admission of this evidence, the Circuit Court of Appeals for the Eighth Circuit says as follows:

"Under these rules the evidence relating to the situation and transactions of the defendants below and the police officers at Tulsa on the 24th and 25th of March, 1917, was clearly incompetent, irrelevant and prejudicial: (1) Because it fails to prove any sale of or dealing in narcotics at Tulsa by either of the defendants; (2) because no proof or evidence was produced at the trial that the situation or transactions at Tulsa in March, 1917, were in any way a part of or connected with the alleged sale of the bottle of morphine by Mrs. Paris to Daisy Allen in Oklahoma City on February 15, 1918; and (3) because the intent of the defendants, or either of them, was not an essential element of the offense with which they were charged in the case at bar."

An analysis of the above quotation will show that the court ruled as it did, first, because the evidence permitted to be introduced was vague and uncertain in that it did not fully show or prove a dealing in narcotic and, secondly, that not only the difference in time of substantially one year but also the geographical situation, namely, acts in one city far removed from another, was a factor in determining its incompetency and that the evidence was in no way a part of or connected with the sale of the bottle of morphine for which the defendant was being tried.

If we analyze the evidence we find that the so-called similar offenses which the appellant complains of were limited to transactions between the defendant and the very person who was the chief Government witness and who made the purchase of the coupons which the appellant is charged with having embezzled. These other offenses show a plan and series of transactions over a period of three or four months. Hence the facts of the present case are clearly distinguishable from any of the facts related in any of the cases analyzed. It therefore follows, that those cases cannot be used as an authority for charging the trial court in the instant case with the commission of prejudicial error.

Another case cited by appellant is that of *Gart v. United States*, 294 Fed. 66, which was an action in which the defendant was charged under an indictment for the violation of the Harrison Narcotic Act, and in the trial evidence was introduced by the Government which tended to show that at different times and upon the public streets of a city, the defendant delivered a package to another party. The evidence did not show the contents of the

package, but the inference was strong that this package contained narcotics. In speaking of the prejudice worked against the defendant under such circumstances, the Circuit Court on appeal said as follows:

“It must be apparent that such a line of testimony if not properly admissible would be highly prejudicial. Standing as evidence before the jury, it might easily lead them to the conclusion that the defendant was in the habit of making sales of narcotics on the streets by delivering packages containing the drug to persons indiscriminately and yet there was no proof that the package so testified as having been delivered by the defendant at a time and place not charged in the indictment contained narcotic drugs. This left the matter in the nature of a mere suspicious circumstance, which not having been taken from the jury by the trial court left it with them for consideration.”

From the above quotation it is easily discernible why the action of the trial court in that case was condemned and the case is therefore not authority for a reversal of the instant case because of the wide difference in the factual situation.

The case of *MacLafferty v. United States*, 77 Fed. (2d) 715, is cited by the appellant as an authority justifying a reversal on the ground of the erroneous admission of evidence of similar offenses, but when this case is analyzed it also fails to support the legal proposition contended for by the appellant. This case is also a narcotic case in which a physician and surgeon was charged with violation of the Harrison Narcotic Act, the indictment being in three counts and the testimony showing that at the trial and over the objection of the defendant, he was cross-examined concerning other and different charges than

those contained in the indictment, and the court in discussing the facts in this particular situation said as follows:

“We hold that before the evidence in relation to these prescriptions other than the ones described in the indictment could be admitted in evidence it was necessary for the Government to show that such other prescriptions or sales were connected with actual violations of the law.”

In other words, in this holding the court had recourse to the principle announced in the *Gart* case, namely, that it was definitely prejudicial to a defendant to have vague and suspicious circumstances introduced in evidence against him where the circumstances themselves did not show a violation of the law but permitted the jury to draw such inference. The last quotation is very persuasive of the fact that had the Government established these prior prescriptions or sales as actual violations, the holding of the Court might have been different. We say this for the reason that in the *MacLafferty* case this Court quoted, with approval, the language used by the Fifth Circuit in the case of *Dysart v. United States*, 270 Fed. 77, where in disposing of another narcotic case the Fifth Circuit said as follows:

“The evidence shows beyond dispute that plaintiff in error issued within a few months many hundred prescriptions for morphine sulphate to persons addicted to the use of morphine, who came to him not for medical treatment, but for prescriptions upon which they could secure morphine to satiate their appetites.”

V.

The District Court Did Not Err in Admitting, Over the Objection of Appellant, Evidence of Similar Offenses.

We have already analyzed the authorities submitted by the appellant, and have shown beyond any question that they have no application to the facts involved in the instant case. We refrained purposely from answering the State Court authorities cited by the appellant and some cases quoted from for the reason that we are inclined to the view expressed by the case of *McNabb, et al. v. United States*, 318 U. S. 332, where the court said:

“The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, see *Nardone v. United States*, 308 U. S. 338, 341-42, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. *E. G.*, *Ex parte Bollman & Swartzout*, 4 Cranch 75, 130-31; *United States v. Palmer*, 3 Wheat. 610, 643-44; *United States v. Furlong*, 5 Wheat. 184, 199; *United States v. Gooding*, 12 Wheat. 460, 468-470; *United States v. Wood*, 14 Pet. 430; *United States v. Murphy*, 16 Pet. 203; *Funk v. United States*, 290 U. S. 371; *Wolfe v. United States*, 291 U. S. 7; see 1 Wigmore on Evidence (2d ed. 1940) pp. 170-97; Note, 47 Harv. L. Rev. 853. And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance.”

The question of the admissibility of evidence of other offenses is one which must always be decided by a trial court in each particular case.

This question was very properly treated by Justice Hand in the case of *United States v. Brand*, 97 F. (2d) 605 (2d Cir.), where the court said:

“The first is the admission on the scienter of the sale by Brand of the other stolen car to one Ross. The Argument is based on the doctrine of *Regina v. Oddy*, 2 Denison C. C. 272, *Copperman v. People*, 56 N. Y. 591, and *Edwards v. U. S.*, 18 F. (2d) 402 (C. C. A. 8), that evidence of the receipt of other stolen goods is not admissible unless the prosecution proves that the accused knew them to have been stolen. At least in this circuit there is no such doctrine. *Sapir v. U. S. (C. C. A.)*, 174 F. 219. We later did indeed give an *obiter* assent to *Regina v. Oddy*, *supra*, in *Wolf v. U. S. (C. C. A.)*, 290 F. 738, but the evidence then before us was clearly inadmissible anyway; and the authority of the case is to be understood as limited to the facts. *Means v. U. S. (C. C. A.)*, 6 F. (2d) 975, 979. *Nakutin v. U. S.*, 8 F. (2d) 491 (C. C. A. 7), states the proper doctrine, for the competence of such evidence does not depend upon conformity with any fixed conditions, such as upon direct proof of scienter, or the identity of the thief in the earlier instance, or of the victim, or the number of instances in which the accused received stolen goods, or the similarity of the goods stolen. These are all relevant circumstances but not necessary constituents. Nor can we see any basis for distinguishing between knowledge and intent in such cases. The judge must decide each time whether the other instance or instances form a basis for sound inference as to the guilty knowledge

of the accused in the transaction under inquiry; that is all that can be said about the matter. If, for example, the subject of the indictment were the last of a series of purchases from the same thief; the earlier purchases would be competent, for thieves are unlikely to risk repeated transactions with innocent buyers. Again if a number of purchases were of goods of the same kind, mere coincidence is less probable as their number increases."

Regarding the admission of evidence of other similar offenses, we desire to call the attention of the court to the case of *Wolfson v. United States*, 101 Fed. 430 (5th Cir.). This was a case wherein the defendant was charged with the crime of embezzlement, as was the defendant in the instant case. Evidence of other offenses both prior to and after the offense charged were admitted in evidence over the objection of the defendant. Concerning the admission of this evidence and whether or not it constituted prejudicial error, the court said as follows:

"It is assigned that the court erred in admitting, against the objection of the defendant, the testimony of Edward P. Moxey, tending to show that the account of the defendant with the Union National Bank of New Orleans had been largely overdrawn, as appeared from alleged entries in the books of that bank prior to the 21st day of April, 1894, and as far back as February, 1892, covering a period of time more than three years prior to the filing of the indictments. It is insisted that the evidence of Moxey tended to show the commission of criminal offenses for which Wolfson was not on trial, and that these offenses were barred by the statute of limitations. One of the offenses charged in the indictment was

the unlawful abstraction of money from the bank. The money was paid out on Wolfson's checks. Wolfson apparently had to his credit \$267.97. Some of the checks were drawn for sums less than the amount standing on the books to Wolfson's credit. If Wolfson really had the money on deposit, that would be a defense to the charge, because it would be no fraud to draw out his own money. It was, therefore, relevant for the government to prove, if it could, that he in fact had no money to his credit; that is, the government had the right to prove, if it could, that his account was overdrawn. When a defendant is on trial for one offense, irrelevant testimony of the commission of another offense should not be received. If, however, the evidence is relevant, if it tends to prove the commission of the offense for which the defendant is on trial, or, in cases where the intent is material, if it tends to show the intent with which the act charged was committed, the fact that the evidence shows the commission of another offense does not serve to exclude it."

VI.

The Court Did Not Err in Instructing the Jury Upon the Purpose of the Admission of This Evidence.

The court was very careful in fully and fairly charging the jury concerning the reason for the admission of prior similar offenses and limiting the purpose for which it might be considered. The court even went farther and very carefully instructed the jury concerning the evidence of the witness Murray as he stood before the court in the partial light of an accomplice or conspirator.

The particular instruction of the court to the jury on the question of other similar offenses is found on page

70 of the transcript of record, and for the convenience of the court is copied herein in full, and is as follows:

“You are instructed that any evidence which was admitted bearing on the alleged embezzlement by the defendant of any gasoline ration coupons, other than those mentioned in the indictment, is not to be considered by you for the purpose other than the question of defendant’s intent concerning the coupons charged in the indictment as having been embezzled by him.

“Before the jury may infer guilty intent from the evidence of another crime of a like nature, such offenses and all the elements thereof must be established by evidence which is plain, clear, and conclusive.

“The jury may infer guilty intent from evidence of other crimes of a like nature, if any is shown by the evidence, only if it first believes from other evidence that the act charged by the indictment was done by the plaintiff.”

Conclusions.

It is respectfully submitted that the District Court did not commit error, and therefore its judgment should be affirmed.

Respectfully submitted,

CHARLES H. CARR,

United States Attorney,

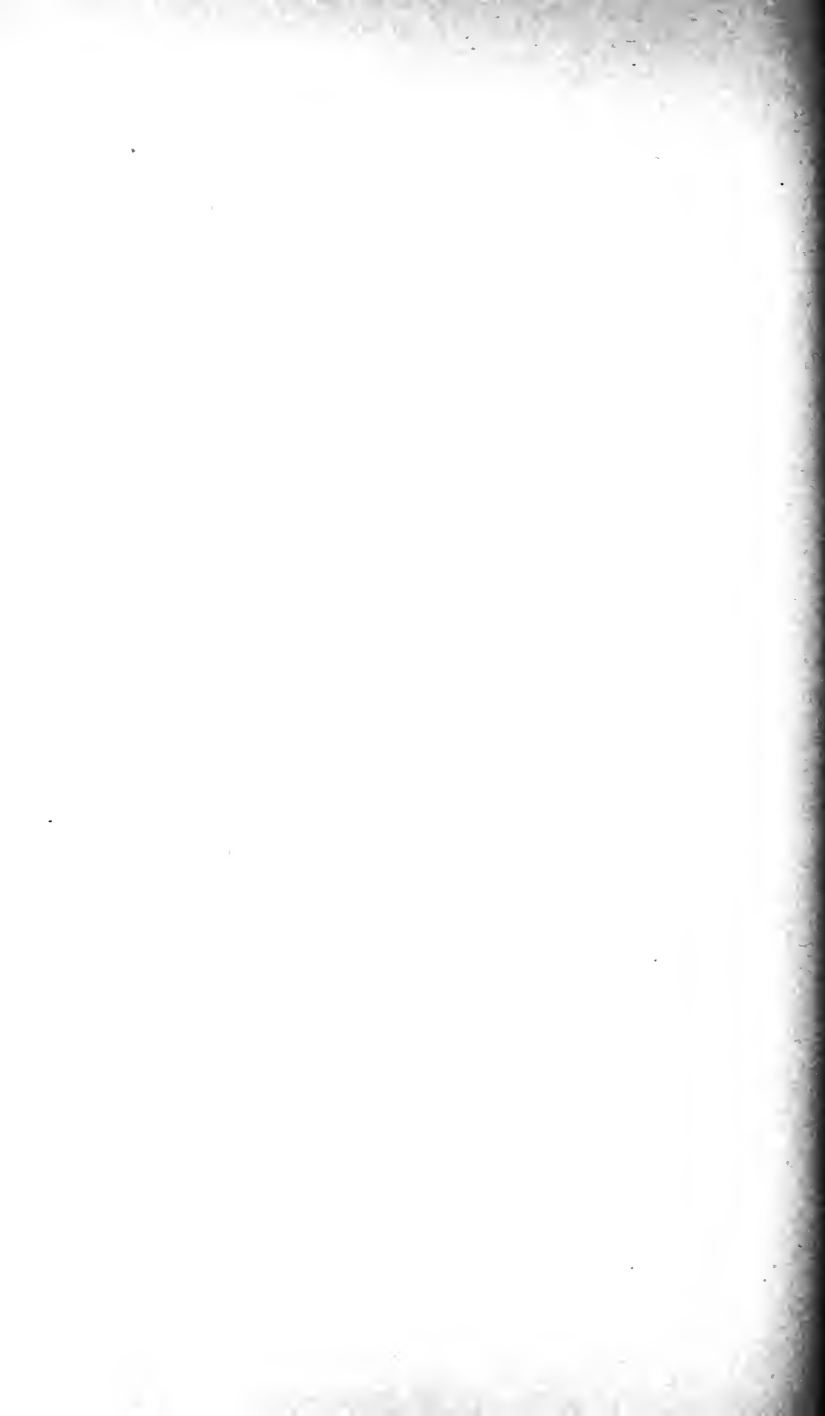
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No. 10519 Cr.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NATHANIEL WINSTON HENDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I.

Appellant's Reply to Appellee's Objections to Appellant's Specification of Errors.

Appellee does not attempt to discuss the merits of appellant's specification of errors based upon the trial court's denial of appellant's motion for a directed verdict of acquittal, as set forth on pages 9 and 10 of appellant's opening brief, nor the argument presented in connection with that specification on pages 11 to 19, inclusive, of said brief, but instead invokes what was formerly known as Rule 11 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, and asks this Court to refuse to consider the assignment of error upon which that specification is based, because, as is asserted, appellant has failed to comply with the requirements of that rule. What was formerly Rule 11 is now a part of the Court rules and is contained in a paragraph headed, "Assignment of Errors" under the heading, "Criminal Appeals." The portions of the rule upon which appellant

relies are subdivisions "b" and "d" thereof, which read as follows:

"(b) When the error alleged is to the admission or the rejection of evidence, the assignment of errors shall quote the grounds urged at the trial for the objection and the exception taken and the full substance of the evidence admitted or rejected."

"(d) Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard thereon except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

Appellee argues that the rule requires "the full substance of the evidence admitted or rejected," to be contained in the assignment. While this is undoubtedly true where the error alleged is the admission or rejection of evidence, yet it certainly can not be the rule where the assignment is based upon the court's denial of a motion for a directed verdict of not guilty, since that would require a repetition of all the evidence contained in the bill of exceptions. But, conceding that the rule has not been complied with, either in the assignment based upon the denial of the motion for a directed verdict of not guilty or in the assignment based upon the Court's error in allowing in evidence testimony of similar offenses, the question is whether this Court may consider the errors complained of even though they be improperly or defectively assigned.

It will be noted that the rule itself contains a qualification which gives the court the right to consider such error. In subdivision (d) of the Rules, it is provided that "the court at its option, may notice a plain error not assigned." That exception to the general rule has been

interpreted and applied in numerous cases. The courts have held that that exception is as old as the rule itself, and it gives the court the right in criminal cases, where the life or liberty of a citizen is at stake, to give consideration to errors substantially prejudicing the rights of a defendant, even where such error was not properly raised by objection, exception, request, or assignment. We quote from the case of *McNutt v. United States*, 267 Fed. 670, where this matter is discussed.

“The United States attorney meets his (appellant’s) brief and argument with the objection that because there were no objections or exceptions to any of the evidence, or any of the rulings of the court at the trial, there is nothing here for this court to consider or review and the judgment must be affirmed. *Such is undoubtedly the general rule, but there is an exception to it as firmly established as the rule itself. It is that in criminal cases, where the life or liberty of the citizen is at stake, the courts of the United States in the exercise of a sound discretion, may notice and relieve from radical errors in the trial which appear to have been seriously prejudicial to the rights of the defendant, although the questions they present were not properly raised or preserved by objection, exception, request, or assignment of error.* *Wiberg v. United States*, 163 U. S. 632, 658, 16 Sup. Ct. 1127, 41 L. Ed. 289; *Weems v. United States*, 217 U. S. 349, 363, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705; *Sykes v. United States*, 204 Fed. 909, 914, 123 C. C. A. 205, 210; *August v. United States*, 247 Fed. 388, 392, 168 C. C. A. 428, 432; *Fielder v. United States*, 227 Fed. 832, 833, 142 C. C. A. 356, 357.” (Italics ours.)

In *Robinson v. United States*, 290 Fed. 55, the defendant was convicted of conspiracy to violate the National Prohibition Act. It was contended by the Govern-

ment that error had not been properly assigned. In discussing this contention the court said:

“No claim was made in the court below that the government had failed to prove the alcoholic content of the whisky; no request to charge upon the subject was made; neither was any motion to dismiss upon the ground made; and there is no assignment of error upon that ground. Nevertheless upon the argument in this court the point was raised. The assignment of errors has been said to be the cause of action in the appellate court, and where none is filed there is nothing for the court to act upon. *Henderson v. Halliday*, 10 Ind. 24. It is in effect the appellant’s complaint in the appellate court, and resembles the initial pleading in the lower court. 2 Encyc. of Pleading and Practice, 921. But in criminal cases the courts have not always confined themselves to the errors assigned, but have often examined the record generally in the interests of justice; and in some states by statute no assignment of errors in criminal cases is required. *Id.* 929.

“The Supreme Court in a criminal case, *Wiborg v. United States*, 163 U. S. 632, 658, 16 Sup. Ct. 1127, 1137 (41 L. Ed. 289), where the error committed had not been called to the attention of the trial court, said:

‘And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it.’

“So in *Crawford v. United States*, 212 U. S. 183, 194, 29 Sup. Ct. 260, 264 (53 L. Ed. 465, 15 Ann. Cas. 392), the court again referred to this subject and said:

‘In criminal cases courts are not inclined to be as exacting, with reference to the specific character of the objection made, as in civil cases. They will,

in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception.'

"Again in *Weems v. United States*, 217 U. S. 349, 362, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705, the matter was referred to, and the court in a criminal case declared that it would consider an assignment of error which was made for the first time in that court—the right asserted being of such high character as to find expression and sanction in the Constitution.

"The act of February 26, 1919 (40 Stat. 1181 (Comp. St. Ann. Supp. 1919, 1246) amending section 269 of the Judicial Code, provides as follows:

'On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions, which do not affect the substantial rights of the parties.'

"While this statute may not be mandatory, compelling the courts to consider in all cases errors not assigned (*Thompson v. United States* (C. C. A.) 283 Fed. 895, 897), it certainly granted to the courts the statutory right to consider errors not assigned or specified. In view of the statute we shall consider the question raised that the record does not disclose that the whisky herein involved contained 'one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes' as provided in the National Prohibition Act."

In *Humes v. United States*, 182 Fed. 485, at 486, the court used the following language:

"It is quite doubtful if there is a sufficient exception or assignment of error to compel consideration

of this question; *but, as it is vital to the defendant in a case in which personal liberty is involved, we are disposed under the authority of Wiborg v. United States, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289, Clyatt v. United States, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726, and Crawford v. United States, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, not to pass it by.*" (Italics ours.)

Peru v. United States, 4 Fed. (2d) 881, involved the question of the introduction of evidence in violation of the "search and seizure" amendment to the Constitution. It was claimed that the defendant's motion to instruct a verdict had been waived by introducing a defense and failing to renew the motion at the end of the case. In this connection the court said:

"The motion to instruct a verdict as to Bird on count 5 made at the close of government's case, should have been sustained. Whether this was waived by proceeding with the defense and the failure to renew the motion at the close of the evidence need not be determined, as *a conviction of crime with no evidence to support it whatever presents upon the whole record such a palpable and manifest error as warrants the appellate court in considering it, even if there be no assignment of such error, as is contended here.*" (Italics ours.)

In the case of *Skuy v. United States*, 261 Fed. 316, the defendant was convicted of perjury. It was the contention of the Government that the errors claimed should not be considered by the court because no proper exceptions or objections had been made or taken. The court said:

"The contention that proper objections were not made, and proper exceptions were not taken, to permit the consideration in this court of the issues which have been discussed, has not escaped attention,

but it fails to convince. *Hall v. U. S.*, 150 U. S. 76, 80, 82, 14 Sup. Ct. 2, 37 L. Ed. 1003; *Waldron v. Waldron*, 156 U. S. 361, 380, 381, 382, 15 Sup. Ct. 383, 39 L. Ed. 453. *And even if it were tenable, this is a trial for an alleged crime, it involves the liberty of the citizen, and the fault in the trial is so radical that it may well be noticed and corrected by this court without objection, exception, or assignment.* *Wiborg v. United States*, 163 U. S. 632, 659, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; *August v. United States*, 257 Fed. 388, 391, 393, C. C. A.” (Italics ours.)

Paris v. United States, 260 Fed. 529, cited in our opening brief on another point, was a conviction for violation of the Harrison-Anti-Narcotic Act. One of the errors assigned was the admission of evidence of other offenses, and the Government objected to a consideration of that point because the substance of the evidence was not set forth. In discussing this contention the court said:

“Counsel argue that the sixth assignment of error, on which the challenge of the evidence relative to the Tulsa transaction rests is insufficient because it fails to set forth the substance of the evidence erroneously admitted, as required by rule 11 of this court (188 Fed. ix, 109 C. C. A. ix). But the assignment clearly states that the error to which it is directed is the admission over the objection and exception of the defendants of the testimony of a witness that the defendant was caught with the bottles of morphine in his possession at Tulsa, in the Eastern district of Oklahoma, a long time previous to his apprehension and arrest in the Western district. This assignment may not constitute a strict technical compliance with the literal terms of rule 11, but it accomplished the object of that rule; it gave fair notice to counsel and court of the claim of error which

has been discussed. for the record contained evidence concerning only one transaction, and at only one time, when at Tulsa the defendant was caught with bottles of morphine. *This is an important case to the defendant. It involves his imprisonment, his deprivation of liberty, for 2 years. The counsel for the United States have not been misled regarding, or ignorant of the claim of error to which this assignment points, and this court is unwilling to disregard it on account of the harmless defect in the assignment.*" (Italics ours.)

In *Ayers v. United States*, 5 Fed. (2d) 607, no sufficient motion for a directed verdict was made and there was no proper assignment of the denial of that motion. On appeal, however, the court considered the sufficiency of evidence despite the defect in the assignment, applying the exception to the general rule. The court stated that the appellant had been convicted of an offense which the evidence had completely failed to show he had committed, and said that the error was too plain and vital to be overlooked.

In the following cases the courts applied the exception to the rule, considering the sufficiency of the evidence even where no motion for a directed verdict had been made by appellant.

Williams v. United States, 66 Fed. (2d) 868;

Lewis v. United States, 92 Fed. (2d) 952;

Crabb v. United States, 99 Fed. (2d) 325.

And in this circuit this Court has considered grave error despite the failure of the appellant to properly preserve and present the error in connection with the rule. see *Morrissey v. United States*, 67 Fed. (2d) 267.

Under the rule of this court that the court "at its option" may notice a plain error not assigned and in

view of the decisions hereinabove cited, we believe that this is a case in which the errors are so grave and so vital to the appellant that this court should, in the exercise of the discretion vested in it, consider such errors regardless of any defect in their presentation. This case is one which contains all of the requirements necessary for the application of the exception to the general rule; it is a criminal case, one involving the liberty of the appellant—the sentence imposed being five years in the penitentiary, the maximum term prescribed by the statute, and the error is plain, grave and manifestly prejudicial to the substantial rights of appellant. The error which the Government claims was not properly assigned was the denial of appellant's motion for a directed verdict of not guilty. This involves the question of the sufficiency of the evidence. Even if it be conceded that this assignment is defective, still, neither the court nor counsel could possibly be misled or put to any inconvenience thereby, since under our specification of errors on this point, as set forth in our opening brief, pages 9 and 10, the details of the insufficiency are clearly set forth. Our contentions, as there indicated, are that there was no proof that the coupons were the property of the United States, and no proof that the coupons had come into the possession of appellant in his fiduciary capacity as chairman of the War Price and Rationing Board; in other words, that the Government failed completely in its proof of the *corpus delicti* of the offense of embezzlement. If our position be correct, then, as was the situation in the case of *Ayers v. United States, supra*, appellant has been "convicted of an offense the evidence completely fails to show he had committed." We believe such error is grave enough to call for the application of the exception to the general rule. No claim is advanced by appellee that no motion was made, or that having been made it was not

properly excepted to, but appellee relies upon a defective assignment. As indicated in the cases cited hereinabove, our courts have considered the sufficiency of the evidence under the exception to the rule, even where no motion at all was made and where no assignment of any kind was presented.

The record on this appeal is very brief, and all of the evidence as set forth in the transcript is contained in only 30 pages [Tr. pp. 36 to 66, inclusive]. The failure of the appellee to prove the essential elements of the offense of embezzlement is so manifest from a cursory reading of this evidence that we do not believe such reading will impose a burden upon the court, even in the absence of a proper assignment of error, particularly since the specification of error as set forth in the brief and the argument thereon point out with particularity the error relied upon. Under the circumstances, we respectfully urge that the court in the exercise of its discretion apply the exception to the general rule and consider the error claimed by appellant, even if it be held to be defectively assigned.

In connection with appellant's Assignment No. 3 of the Assignment of Errors (App. Op. Br., p. 10 and pp. 19 to 36, Inc.), based upon the erroneous admission of evidence of other separate and distinct offenses not charged in the indictment, appellee suggests that this error has been defectively presented, but concedes that the court has the inherent right to notice such prejudicial error, and for that reason attempts to reply to appellant's argument on that assignment.

If this assignment be defective, it comes within the same category as that hereinabove discussed, and since this error also is so manifestly prejudicial to appellant's rights, we ask the court to apply the exception to the

general rule and consider it in the same manner as if it had been properly assigned. Again we suggest that such a course will work no hardship upon the court or upon counsel for the appellee. In the specification of errors (App. Op. Br., p. 10), appellant has set forth the details of this error, and in addition has supplemented the specification with an appendix attached to the brief, setting forth all of the testimony adduced with reference to the other offenses. This testimony is all contained in seven pages. It was given by one witness, was developed in chronological sequence and prior to the testimony concerning the offense charged in the indictment, and is so clearly segregated from the latter testimony that it can be readily followed even in the transcript itself. The point has been fully covered in the brief and supported by authority. Certainly the Government can not claim that it has been misled in this matter, since the question was raised and argued in the trial court, and only one witness, James P. Murray, testified to other offenses. This situation is somewhat similar to that present in the case of *Paris v. United States*, *supra*, where the court considered the error in the admission of testimony of other offenses, though no proper assignment had been made, basing its ruling upon the fact that the Government could not have been misled and that the case was of importance to the defendant, since it involved his imprisonment, and the deprivation of his liberty for a period of two years. Here, appellant has been sentenced to five years in the penitentiary.

As stated above in connection with this point, the Government recognizes the court's right to take notice of this prejudicial error, even if it be defectively assigned, and we believe that, under the circumstances, the interests of justice would be served if the court exercised that right in this instance.

II.

**Reply to Appellee's Discussion of Appellant's Claim
That the Court Erred in Admitting Evidence Of-
fered for the Purpose of Proving Other Separate
and Distinct Offenses Not Charged in the Indict-
ment.**

In our opening brief at pages 19 to 36, we discussed the erroneous admission of evidence of other offenses, and we thought we had made our position clear. However, a reading of appellee's brief on this point leads us to believe that counsel for appellee has failed completely to grasp the force of our contention, or, understanding it, is unable to answer it.

As pointed out in our opening brief, we contend that this evidence was inadmissible for the purpose of proving intent:

1. Because evidence of other offenses is admissible only when the intent accompanying the act is equivocal or doubtful, and in the instant case, if appellant did the act in the manner testified to there could be no question as to the intent with which it was done, and hence no need for evidence of other offenses; and

2. Because, even conceding the admissibility of evidence of other offenses in cases of this nature, the required proof of those offenses was not made by the Government in this case, that is, such offenses were not proved to the same extent as was necessary in the case of the offense charged, and were not proved by evidence which was "plain, clear, and conclusive."

At the outset, appellee suggests that we have not differentiated between evidence of facts which constitute some "legal offense" and facts which prove the commission of an exactly "similar offense." The implication

in that statement, we take it, is that while the facts in this case do constitute offenses committed by appellant, yet they do not constitute offenses similar to the one charged against appellant, and that, therefore such evidence is admissible. But counsel for appellee must have totally misconceived the principle underlying the admission of evidence of other offenses for the purpose of proving intent, or he would not have advanced such a contention, since it is only evidence showing offenses similar to that charged against a defendant which is admissible; if the offenses shown by the evidence be not similar, then they can not be used under any circumstances for the purpose of proving intent.

The only argument made by appellee in reply to our contentions on this point is contained in a paragraph on page 7 of appellee's brief, as follows:

"It is the position of the appellee that it does not make any particular difference whether these instances referred to in the record constitute past completed offenses, or whether or not, as contended by appellant, evidence of this character must show 'that the proof of the latter offense must be plain, clear, and conclusive.' The instances complained of by appellant show a chain of connected acts between the defendant and the witness limited in point of time to their immediate conduct for a period of three months, and each particular act complained of shows that the defendant was misusing the coupons under his charge, namely in some instances giving them away without pecuniary gain and in others making an outright sale. This evidence shows plan, scheme, design, and was admissible in evidence as tending to prove the particular intent existing in the mind of the defendant at the time of the commission of the offense for which he stood trial."

The first sentence of that argument is wholly beyond our comprehension, and we are, therefore, unable to make comment thereon. In the balance of the paragraph appellee argues that the evidence shows that the appellant was misusing the coupons under his charge, in some instances giving them away without pecuniary gain, and in others making an outright sale, and that this evidence tended to prove the intent of appellant in connection with the offense charged. In other words, appellant concedes exactly what we have argued, that the Government introduced evidence of other purported offenses—misusing and giving away coupons, which is a criminal offense, and selling them outright, which of course would be either larceny or embezzlement; and appellee's only argument in support of the court's ruling admitting this evidence is contained in the last sentence of the above paragraph, where it is stated that this evidence was admitted "to prove the particular intent existing in the mind of the defendant at the time of the commission of the offense for which he stood trial." We find no supporting argument or authority, however, for this assertion. Appellee has failed to point out how or under what rule such evidence would be admissible to prove intent in this case, and we have carefully examined appellee's brief to see whether it contained any other or further argument in addition to that one sentence, but our search has been fruitless.

Nor has appellee answered our argument that the very evidence which he concedes was introduced, namely, misusing, giving away and selling the coupons, was not admissible because the intent with which the act charged was done was not equivocal.

Nor has appellee replied to our argument that the requisite proof of such other offenses was not made; that

the Government assumes the same burden in respect of such offenses as it does with reference to the offense charged; and such proof must be plain, clear, and conclusive, as charged by the court.

Under a heading, "Analysis of Cases Cited by Appellant" (Resp. Br., p. 8), appellee has attempted to analyze appellant's authorities cited in support of this assignment. We will briefly reply to this analysis.

Appellee states that there is no similarity between the facts in this case and those in the case of *Fish v. United States*, 215 Fed. 544, cited by appellant (Resp. Br., p. 8). The *Fish* case is cited on pages 23 to 25 of appellant's opening brief. We thought a mere reading of that case would be sufficient to indicate its applicability here; but so that there will be no question about it, we now point out that the decision therein is authority for our contention that the evidence of other offenses in the instant case was inadmissible because the intent was not equivocal or doubtful. In the *Fish* case it was held that if it was established that the defendant set the fire which was the basis of the charge in the indictment, there could be no doubt that the act of setting the fire was not accidental but intentional, and that, therefore, evidence of other offenses for the purpose of proving intent was inadmissible; and so here, if the evidence showed that appellant delivered 250 gasoline coupons to Murray and received \$30.00 therefor, there was nothing equivocal about the intent with which the act was done, and the situation was the same as if intent were not an issue in the case, and hence the evidence of other offenses was inadmissible.

Appellee objects to our citing the case of *Boyd v. United States*, 142 U. S. 450 (Resp. Br. pp. 8 and 9) in support of our position on this point. We cited that case because it is the leading authority on the general

rule excluding proof of other offenses and on the prejudicial effect of the erroneous admission of such evidence.

Counsel for appellee states that he is at a loss to understand why we cited the case of *Hatchet v. United States*, 293 Fed. 1010 (Resp. Br. p. 10). As in the instance of the *Boyd* case, this authority was cited on the subject of the prejudicial effect of the erroneous admission of other offenses. In the *Hatchet* case, on the pretext of identifying the defendant the Government was permitted to show previous arrests, and that the defendant had a criminal record. There was no issue as to his identity, and hence such evidence was held to be inadmissible. Here, there was no issue of intent, as we have shown, since the intent was unmistakable, if it were established that appellant committed the act; and there being no question as to the intent, evidence of other offenses was inadmissible.

Appellee states that the case of *Paris v. United States*, also cited by appellant, does not support appellant's position. (Resp. Br., p. 11.) But even the quotations from said case, as set forth in appellee's brief, and appellee's own analysis of the case, shows clearly that that case is authority for our contention that the requisite proof of the purported similar offenses was not made. In the *Paris* case, the other evidence complained of involved the possession of morphine. The court held that the evidence was inadmissible because it failed to prove another offense, and in this connection said:

"It is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear, and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible."

And that is our position with reference to the evidence of other offenses erroneously admitted here; we claim that it was not plain, clear and conclusive and did not prove the essential elements of those other offenses.

The case of *Gart v. United States*, 294 Fed. 66, cited by appellant, is also not considered as authority by appellee (Resp. Br., p. 13). However, a glance at that decision will show that the court held that the evidence of a purported similar offense was inadmissible because the similar offense was not proved.

McLafferty v. United States, 77 Fed. (2) 715, cited by appellant, is summarily disposed of by appellee with the statement that "it fails to support the legal proposition contended for by appellant." (Resp. Br., pp. 13 and 14.) This is one of the strongest cases in support of appellant's contention with reference to the failure of proof of the other offenses, and even the excerpt from the decision as quoted on page 14 of appellee's brief clearly shows its applicability. In the case cited the defendant had requested an instruction to the effect that the Government must establish beyond a reasonable doubt that the acts of the defendant in issuing prescriptions other than those charged in the indictment were criminal. The trial court refused to give that instruction, and in reversing the judgment of conviction and holding that the trial court should have so instructed the jury, this court held other distinct offenses that the proof of the latter be plain, clear and conclusive; that it was necessary for the Government to show that the other prescriptions were connected with actual violations of law, and that evidence of a vague and uncertain character regarding such other offenses is never admissible.

At the risk of being considered repetitious, but so that the appellee may not be confused as to our position, we

again state that our objection to the evidence of other offenses is twofold:

1. That because the intent was not equivocal, the evidence was not admissible for the purpose of proving intent;

2. That even assuming such evidence admissible for the purpose of proving intent in a case of this nature, in the instant case the proper proof of such offenses was not made; that is, they were not established by proof "plain, clear, and conclusive" and beyond a reasonable doubt.

Under a heading entitled, "The District Court Did Not Err in Admitting over the Objection of Appellant Evidence of Similar Offenses" appellee presents no argument in support of the contention contained in that heading, but contents himself with citing three cases, none of which has any relevancy to the question in issue:

The first, *McNabb v. United States*, 318 U. S. 332, 87 L. Ed. 579, was a conviction for murder in which the admissibility of confessions improperly obtained was the issue before the court, and it was in connection with a discussion of that question that the Supreme Court used the language quoted by appellee on page 15 of appellee's brief. We do not understand why this case has been cited by appellee. Counsel for appellee states that he has refrained from answering the state court authorities cited by appellant for the reason that he is inclined to the view expressed by the court in the *McNabb* case (Resp. Br., p. 15), and it may be that appellee considers such case authority for the proposition that the federal court has its own rules of evidence and is not bound by the rules of evidence in the state courts. If this be what appellee contends, we can, of course, have no quarrel

with that rule. But we call the court's attention to the fact that most of our authorities cited are cases decided by the federal courts, including this particular court. While the decisions of a state court are not binding, yet they may be, and often are, persuasive, and they evidently have been so considered by those federal courts whose decisions we have cited upon the question of the erroneous admission of evidence of other offenses. For example, in the case of *Pern v. United States*, *supra*, and *Fish v. United States*, *supra*, state cases are cited and relied upon; and in the case of *McLafferty v. United States*, *supra*, this court states that cases from 44 American jurisdictions support the rule governing the admissibility of other offenses.

The second case cited by appellee under this heading is *Brand v. United States*, 79 Fed. (2d) 605, which deals with the admission of evidence of other stolen automobiles in a prosecution for transporting a stolen automobile. Appellee states that this case holds that the admissibility of evidence of other offenses is one which must always be decided by a trial court in a particular case (Resp. Br., p. 16). That statement of the court's duty, of course, is a truism which we can not contradict; but it does not mean, of course, that the court can willy-nilly, as it were, permit the introduction of such evidence without the necessary prerequisites being furnished both for its admission and its proof.

The last case cited by appellee, *Wolfson v. United States*, 101 Fed. 430 (Resp. Br., p. 17), simply states the rule that if evidence tends to prove the commission of an offense or tends to prove the intent with which the act charged was committed, the fact that the evidence shows the commission of another offense does not serve to exclude it. That, of course, is a statement of

a rule well settled, but it has no application to the situation here presented. As we have already pointed out, in the instant case we contend that the evidence of other offenses was inadmissible because this was not a case in which it was necessary to use such evidence of other offenses for the purpose of proving intent, since the intent was manifest from the commission of the act, and also that the requisite proof of such offenses was not made by the Government.

The final argument made by appellee in connection with this point appears under the heading, "The Court did not Err in Instructing the Jury Upon the Purpose of the Admission of the Evidence." Appellee states that the court fully and fairly instructed the jury on the subject of other offenses and sets out that portion of the court's charge in that connection. We would have no criticism of this instruction if evidence of other offenses had been properly admitted and proved in this case; but the evidence having been erroneously admitted, the court's charge thereon simply emphasized the error in its admission and aggravated the prejudice already resulting to the appellant by its admission. Whether the jury followed the court's instructions and considered such incompetent and irrelevant evidence for the purpose of proving intent, or whether it failed to follow those instructions and considered the evidence for some other purpose, appellant's right to a fair and impartial trial was substantially impaired.

We respectfully urge that the judgment of conviction be reversed.

AMES PETERSON,
WILLIAM B. BEIRNE,
Attorneys for Appellant.

No. 10526

United States 7
Circuit Court of Appeals
For the Ninth Circuit.

AL C. FOX, COLLISON GILBRETH, R. E.
SUTTON, ORVILLE HUTCHINS, JOHN S.
JONES, NEPHI N. DUSTIN, MERRILL C.
HUTCHINS, H. M. CHILDERS, WARREN
S. MORDEN, EDWARD F. O'NEILL,
PHILIP EDGAR FERRIS,

Appellants,

vs.

SUMMIT KING MINES, LIMITED, a corpora-
tion,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Nevada

FILED
SEP 18 1943

PAUL P. O'BRIEN,
CLERK



United States
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For the Ninth Circuit.

AL C. FOX, COLLISON GILBRETH, R. E.
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, in and
for the District of Nevada.

Civil Action

File No. 232

AL C. FOX, GOLLISON GILBRETH, R. E.
SUTTON, ORVILLE HUTCHINS, JOHN S.
JONES, NEPHI N. DUSTIN, MERRILL C.
HUTCHINS, H. M. CHILDERS, WARREN
S. MORDEN, EDWARD F. O'NEILL,
PHILIP EDGAR FERRIS,

Plaintiffs,

vs.

SUMMIT KING MINES, LIMITED,

Defendant.

AMENDED BILL OF COMPLAINT

That by stipulation of counsel for the respective parties the plaintiffs file herein this, their amended Bill of Complaint and for cause of action allege:

I.

That plaintiffs severally assert a right arising out of a series of transactions or occurrences where questions of law or fact common to all will arise in the action in accordance with Rule 20 and by reason of there being common questions of law and fact affecting the several rights of all of the plaintiffs and a common relief is sought and in accordance with subdivision (3) of Rule 23 of the Rules of Civil Procedure, for the District Courts of the United States, do hereby bring this action to recover

from defendant unpaid overtime compensation in the estimated amount of \$3,953.83 and an additional equal amount of \$3,953.83, liquidated damages pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Public No. 718, 75th Congress; 52 Statutes 1060), hereinafter referred to as the Act. [2]

II.

Jurisdiction is conferred on the Court by Section 41 (8) 28 U.S.C.A., (Judicial Code) 24, giving the District Court original jurisdiction "of all suits and proceedings arising under any law regulating commerce", and without regard to the citizenship of the parties or the sum or value in controversy, and by Section 16 (b) of the Act.

III.

Defendant is a corporation organized and existing under and by virtue of the law of the State of Nevada and at all times hereinafter mentioned was engaged in mining and milling gold and silver ores and reducing the same to precipitates or bullion at and within the County of Churchill, State of Nevada, and all of which was for transportation in interstate commerce; that substantially all of said gold and silver ores and minerals mined and produced by the defendant have been processed, reduced, concentrated and retorted by the defendant within the State of Nevada and transported in interstate commerce, and have been sold, offered for transportation, transported, shipped and delivered in interstate commerce from the defendant's mill or reduction works, in the County of Churchill, within

the State of Nevada, to San Francisco, in the State of California.

IV.

That during the work weeks beginning in January, 1940, and ending April 1st, 1942, defendant has employed the above named plaintiffs for various periods of time in the mill or reduction works of the defendant in the production of gold and silver ores and reducing the same to precipitates or bullion for interstate commerce; that during all of said period of time substantially all of such gold and silver ores, precipitates and bullion have [3] been produced for interstate commerce and have been sold, offered for transportation, transported, shipped and delivered in interstate commerce from defendant's mill or reduction works in the County of Churchill, in the State of Nevada, to San Francisco, in the State of California.

V.

That during the periods of time that the plaintiffs were employed by the defendant between the second day of January, 1940, and the 1st day of April, 1942, each and all of the plaintiffs rendered services to the defendant as solution men and ball-mill men in the mill or reduction plant of the defendant in Churchill County, Nevada, for a period of eight hours during each and every day that each of the plaintiffs were employed by defendant and during each and every hour for eight hours of each day the plaintiffs were required to give their entire time, knowledge and experience to their work and were

responsible to the defendant for the proper and careful operation of the machinery and equipment, and for the flow, thickening, separation, sampling and other processes of the ore through the said mill or plant and for which the defendant paid to each plaintiff a daily wage for only seven hours for each day and accordingly each plaintiff has given his time and services to defendant for one hour during each day and without any compensation therefor, except as hereinafter explained and modified in paragraph VI; that for each hour that each plaintiff was employed over seven hours per day was in excess of the maximum hours in such work weeks required by Section 7 of the Act; that the employment of plaintiffs for one hour per day in excess of the applicable maximum hours without compensating said plaintiffs for such excess hours at rates not less than one and one-half times the regular rates, at which said plaintiffs were employed was in violation of Section 7 of the Act. [4]

VI.

That on or about the 22nd day of April, 1941, a controversy arose between the manager for the defendant and the men employed in defendant's mill or plant, relative to a proposed increase of wages for the plaintiffs and others; that it was thereupon agreed that the plaintiffs should get an increase in wages of twenty-five cents per day from and after the 23d day of April, 1941; that thereafter the solution men were paid time and one-half for eleven minutes and the ball-mill men time

and one-half for twelve minutes, amounting to twenty-five cents per day and in addition to their wages for seven hours; that the solution men have not been compensated for 49 minutes and the ball-mill men for 48 minutes for each day plaintiffs were in the employ of the defendant as solution men and ball-mill men from and after said 23d of April, 1941; that said increase in wages did not alter the previous working routine in any way and the plaintiffs continued at their employment for eight hours per day and sixty minutes during each hour and until their employment was terminated.

VII.

That the plaintiffs above named were employed by the defendant and at various rates of wages per day, but under the same conditions involving a common question of law and fact affecting their several rights and remedies; that inasmuch as the plaintiffs have not kept accurate time of the number of hours worked by them and do not have access to the books of the corporation, that the number of hours and amount of overtime compensation claimed by the plaintiffs are estimated to the best of the plaintiffs knowledge and belief; that the name of each employee, the period of time worked by him, the number of days [5] and the rate of wages per day, the number of hours during each period of time they were employed and the rate of wages per hour, and the total amount of compensation earned by each plaintiff and unpaid by defendant are estimated as follows:

Summit King Mines

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Name	Periods of time employed	Number of days employed during each period and rate of wages per day	Rate of wages per hour at time & ½	Total
Al C. Fox	Jan. 5, 1940 to June 9, 1940	130 days @ 6.00 a day	1.29	\$167.70
	June 9, 1940 to April 22, 1941	316 days @ 6.35 a day	1.37	432.92
	April 22, 1941 to April 1, 1942	249 days @ 6.35 a day	1.12	278.88
				<hr/> 879.50
Collison Gilbreth	July 24, 1940 to Dec. 2, 1940	112 days @ 5.85 a day	1.25	140.00
	Dec. 3, 1940 to April 22, 1941	121 days @ 6.35 a day	1.37	165.77
	April 22, 1949 to April 1, 1942	40 days @ 1.12 a day	1.12	44.80
				<hr/> 350.57

Name	Periods of time employed	Number of days employed during each period and rate of wages per day	Rate of wages per hour at time & ½	Total
R. E. Sutton	Jan. 5, 1940 to	132 days @ 1.29 a day	1.29	170.28
	June 9, 1940			
	June 9, 1940 to			
	April 22, 1941			
Orville Hutchins	Jan. 2, 1940 to	129 days @ 6.00 a day	1.29	166.41
	June 9, 1940			
	June 9, 1940 to			
	April 22, 1941			
John S. Jones	Oct. 10, 1941 to	140 days @ 5.85 a day	1.00	140.00
	April 1, 1942			
	June 9, 1940 to			
	April 22, 1941			
Nephi N. Dustin	Apr. 22, 1941 to	47 days @ 6.10 a day	1.00	47.00
	Apr. 1, 1942			
				379.89
				166.41
				91.79
				[6]
				258.20
				140.00
				146.25
				47.00
				193.25

Summit King Mines

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Name	Periods of time employed	Number of days employed during each period and rate of wages per day	Rate of wages per hour at time & ½	Total
Merrill C. Hutchins	Nov. 4, 1940 to			
	Apr. 22, 1941	145 days @ 5.85 a day	1.25	181.25
	Apr. 22, 1941 to			
	Apr. 1, 1942	45 days @ 5.85 a day	1.00	45.00
<hr/>				
H. M. Childers	May 17, 1940 to			226.25
	June 9, 1940			
	June 9, 1940 to	20 days @ 5.50 a day	1.18	23.60
	Apr. 22, 1941			
		68 days @ 5.85 a day	1.25	85.00
		206 days @ 6.35 a day	1.37	282.22
<hr/>				
Warren S. Morden	Apr. 22, 1941 to	47 days @ 6.35 a day	1.12	52.64
	Apr. 1, 1942			
				443.46
	Jan. 5, 1940 to			
	June 9, 1940	130 days @ 5.50 a day	1.18	153.40
<hr/>				
	June 9, 1940 to			
	Apr. 22, 1941	4 days @ 1.25	1.25	5.00
<hr/>				
				158.40
				[7]

Name	Periods of time employed	Number of days employed during each period and rate of wages per day	Rate of wages per hour at time & ½	Total
Edward F. O'Neill	Jan. 5, 1940 to June 9, 1940	131 days @ 6.00 a day	1.29	168.99
	June 9, 1940 to Dec. 29, 1940	175 days @ 6.35 a day	1.37	239.75
				<hr/> 408.74
				178.74
Philip Edgar Ferris	Jan. 5, 1940 to June 9, 1940	143 days @ 5.85 a day	1.25	
	June 9, 1940 to April 22, 1941	66 days @ 6.35 a day	1.37	90.42
	Apr. 22, 1949 to Apr. 1, 1942	220 days @ 6.35 a day	1.12	246.40
				<hr/> 515.57
Grand Total.....				\$3,953.83

That the total estimated amount of unpaid overtime wages and liquidated damages due to each plaintiff are as follows, to wit:

Name	Unpaid Overtime	Liquidated Damages	Total
Al C. Fox	\$879.50	\$879.50	\$1,759.00
Collison Gilbreth	350.57	350.57	682.14
R. E. Sutton	379.89	379.89	759.78
Orville Hutchins	258.20	258.20	516.40
John S. Jones	140.00	140.00	280.00
Nephi N. Dustin	193.25	193.25	386.50
Merrill C. Hutchins.....	226.25	226.25	425.50
H. M. Childers	443.46	443.46	886.92
Warren S. Morden	158.40	158.40	316.80
Edward F. O'Neill	408.74	408.74	817.48
Philip Edgar Ferris	515.57	515.57	1,031.14
	<hr/>	<hr/>	<hr/>
	\$3,953.83	\$3,953.83	\$7,907.66

[8]

Wherefore, plaintiffs demand that judgment be awarded to each in the sum hereinabove set forth, or such other sum as may be ascertained that each plaintiff is entitled to for unpaid overtime compensation and for an additional equal amount as liquidated damages, together with costs, and that the court allow a reasonable attorney's fee to be paid by the defendant to plaintiff's attorney.

/s/ M. J. SCANLAN,

Attorney for Plaintiffs.

Duly Verified by M. J. Scanlan.

(Receipt of Service.)

[Endorsed]: Filed Oct. 15, 1942. [9]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Now Comes the defendant, Summit King Mines, Limited, a corporation, and answering the Bill of Complaint on file, herein, denies, admits and avers as follows:

I.

Defendant denies each and every, all and singular, generally and specifically, the allegations contained in Paragraphs I, II, and V of the Bill of Complaint.

II.

Defendant admits the allegations contained in Paragraph III of the Complaint, save and except defendant denies that the mining and milling of gold and silver ores and the reduction of the same to precipitates or bullion within the State of Nevada was for transportation and interstate commerce, and defendant denies that gold or silver ores or minerals mines or produced by defendants, or any other minerals or mineral products mined or processed or reduced by it have been transported in interstate [10] commerce or have been sold or offered for transportation, or transported or shipped or delivered in interstate commerce from any part of the State of Nevada to San Francisco, in the State of California, or any other place outside of the State of Nevada.

III.

Answering Paragraph IV of the Bill of Complaint, defendant denies each and every allegation

contained therein except that defendant admits that it has employed the above named plaintiffs for various periods of time in the mill or reduction works of defendant in the reduction of gold and silver ores, and the reduction of the same to precipitates or bullion, but specifically denies that said production or reduction was for interstate commerce.

IV.

Answering Paragraph VI of the Bill of Complaint, defendant admits all of the allegations therein contained, save and except that defendant denies all of the allegations contained in said paragraph from lines 9 to 13 inclusive on page 4 of said Complaint.

V.

Answering Paragraph VII of the Bill of Complaint, defendant denies each and every allegation therein contained, save and except that defendant admits that the plaintiffs above named were employed by the defendant at various rates or wages per day.

By way of affirmative defenses to the said Bill of Complaint, defendant alleges as follows: [11]

I.

That said Bill of Complaint fails to state a claim upon which relief can be granted.

II.

That the above entitled Court is without jurisdiction of the subject matter of this action.

Wherefore, defendant prays that plaintiffs take nothing by their complaint and that it recover its costs incurred and to be incurred.

THATCHER and WOODBURN.

JOHN P. THATCHER,

Attorneys for Defendant.

(Receipt of Service.)

[Endorsed]: Filed Aug. 24, 1942. [12]

[Title of District Court and Court.]

STIPULATION

It is hereby stipulated and agreed by and between counsel for the respective parties that the plaintiffs may file an Amended Bill of Complaint and that the answer heretofore filed to plaintiff's original Bill of Complaint may be considered as defendant's answer to plaintiff's Amended Bill of Complaint.

Dated this 14th day of October, 1942.

M. J. SCANLAN,

Attorney for Plaintiffs.

THATCHER and WOODBURN,

Attorney for Defendant.

[Endorsed]: Filed Oct. 15, 1942. [13]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by counsel for the respective parties that evidence pertaining to the issues involved in this case may be reduced by stipulations following, to wit:

I.

It is stipulated that the defendant produced gold and silver ores in Churchill County, Nevada, and that the same were reduced to bullion and transported by United States Mail in interstate commerce from Churchill County, Nevada, to San Francisco, California, and that the bullion was sold to the United States Mint at San Francisco, California.

II.

It is stipulated that the computations of the periods of time, number of days, rate of wages per day, was for seven (7) hours and rate of wages per hour was at the rate of seven (7) hours per day with time and one-half for overtime and the total amount of compensation claimed to have been earned and unpaid as stated on pages 5, 6 and 7 of plaintiffs' Amended Bill of Complaint are correct in accordance with plaintiffs' theory of the case and need not be proven. [14]

III.

It is also stipulated that the testimony of the plaintiffs not present at the trial would be the same

as the plaintiffs testifying as to the same character of work, mill routine, policy of management, making time and work reports and other evidence of a general nature pertaining to their employment, and that they would also testify as to the number of days they were employed, the rate per day and the rate per hour at time and one-half and the total amount claimed to be unpaid, would be the same as itemized for each plaintiff respectively on pages 5, 6 and 7 of plaintiffs' Amended Bill of Complaint.

Dated this 20th day of October, 1942.

M. J. SCANLAN,

Attorney for Plaintiffs.

THATCHER and WOODBURN,

Attorney for Defendant.

[Endorsed]: Filed Oct. 21, 1942. [15]

[Title of District Court and Cause.]

OPINION AND DECISION

Norcross, District Judge.

This is an action brought under the "Fair Labor Standards Act of 1938," Tit. 29 U.S.C.A. #201-219. Plaintiffs were employees of defendant, a Nevada Corporation, in the operation of its mill for the reduction of gold and silver ore, located about thirty miles from Fallon, Nevada. The product of the mill operations is gold and silver bullion which is shipped direct to the United States Mint at San

Francisco. While the mill is classified as one of seventy ton capacity, the average amount of ore treated therein during the time in question was approximately fifty-five tons per day. The mill was operated continuously for twenty-four hours a day. Each work day was divided into three shifts of eight hours each. The mill embraced two classifications designated as ball mill and solution operations. Two men were employed on each shift, one in charge of the ball mill and the other of the solution process, [16] each to aid the other if occasion required. The man in charge of the solution process was, also, in general charge but in case of temporary absence of either, for any cause, the other remained in charge. Seventy-two hours is the time usually consumed from the time the ore enters the mill until the actual values in bullion form are finally recovered.

The mill began operations on January 5, 1940, when the 42-hour week was in effect under the said Fair Labor Standards Act and since has been in operation continuously including all the time herein in question. Prior to the opening of the mill on December 29, 1939, the defendant posted in the mill a notice to mill employees on a daily wage basis to the effect that the men would work 7-hour shifts, relieving each other one hour for lunch. From January 5, to June 11, 1940, the wages of the solution men were \$6.00 per day and of the ball mill men \$5.50 per day for a six day week, at which latter time the wages were increased, respectively, thirty-five cents per day. On October 23, 1940, the forty

(40) hour week went into effect and from that time on defendant paid overtime payments therefor, but the basic wages and seven working hours per shift remained unchanged. On April 23, 1941, a controversy respecting a demand for increase in wages was settled by an agreement entered into between the respective parties by the terms of which the solution men would work 11 minutes more and the ball mill men 12 minutes more per shift, for which overtime would be paid, in an amount approximating \$1.50 per week, such additional work time to be performed during the lunch hour shortening the same, respectively to 49 and 48 minutes. Notice of the same was posted in the mill.

Of the eleven plaintiffs but three were employees at any time during the year 1942; five others were employed during a portion of the year 1941, and all began their employment at various [17] times during the year 1940. Time covered, from date of employment to date of termination thereof, varied from about five months to two years, the average eight hour shift mill time being approximately, one year and four months and of specified working time, seven hours, one year and two months.

The salient portions of the two notices, above referred to as posted in the mill, read as follows:

“Attention Mill Men December 29th, 1939.

“The following Rules Will be Observed in the Mill.

“1. The Solution Man on shift will be in charge of the mill***

- “2. Men will work seven hour shifts, relieving each other one hour for lunch.*** The operator relieving will be responsible for the other operators work as well as his own.***
- “3. Time cards will be filled out for each man on shift.***
- “4. For all major repair work call the Master Mechanic.
- “5. For any major trouble on the afternoon or night shift call the Mill Superintendent by phone at once.
- “6. *** 7.*** 8.*** 9.***
- “10. All wages have been raised 25c per day*** as at the present time there are no living accommodations at the property.”

“Notice to Mill Employees on
Daily Wage Basis. April 23, 1941.

“To comply with the agreement reached April 22nd, 1941, whereby overtime arrangements were to be made to enable employees to earn \$1.50 more per week, the following schedule has been worked out:
“Solution Men:

“Your shift including the lunch period will be 8 hours as it always has but instead of taking one hour for lunch you will take 49 minutes.

“On your time cards mark Daily rate \$6.35 but under time worked put 7 hours plus 11 minutes overtime. This will result in an increase of \$1.50 per week.

“Ball Mill Men:

“Your shift***.” Note: same as above for [18] Solution Men with exception of “48 minutes” and “daily rate \$5.85.”

“Men earning \$5.25 per day: ***. ***.
\$5.00 per day. ***.”

Plaintiffs demand judgment for a total unpaid overtime for labor, so rendered, in the sum of \$3,953.83; liquidated damages in the same amount, as provided by statute, attorneys fees and costs. Such claimed right of recovery is based both on the contention that the said lunch hour, in its entirety, should be included in overtime computation, as a matter of law and that services were actually rendered during that time. These contentions are controverted by defendant and in addition it is alleged: “That the Court is without jurisdiction of the subject matter of this action.”

A stipulation was filed by counsel for the respective parties “that evidence pertaining to the issues involved in this case may be reduced by stipulations following, to wit:

“*** that the computations of the periods of time, number of days, rate of wages per day, was for seven (7) hours and rate of wages per hour was at the rate of seven (7) hours per day with time and one-half for overtime and the total amount of compensation claimed to have been earned and unpaid as stated on pages 5, 6 and 7 of plaintiff’s Amended Bill of Complaint are correct in accordance with plaintiff’s theory of the case and need not be proven.

“*** that the testimony of plaintiffs not present at the trial would be the same as the plaintiffs testifying as to the same character of work, mill routine, policy of management, making time and work reports and other evidence of a general nature pertaining to their employment, and that they would also testify as to the number of days they were employed, the rate per day and the rate per hour at time and one-half and the total amount claimed to be unpaid be the same as itemized * * * in plaintiffs’ Amended Bill of Complaint.”

But three of the plaintiffs testified at the hearing. Their testimony mainly related to claimed services customarily performed by them during the so called lunch hour, following completion of [19] luncheon and subject to occasional call for assistance before completion thereof. Testimony to the contrary was offered by the defendant whose witnesses were the manager of the company and mill superintendent. This testimony was to the effect that while not present during all lunch hours, they were frequently so present and never had observed the solution or ball mill men returning to work prior to the termination of their lunch hour; that an occasion for such returning would seldom happen; that when on duty during the hours covered by their shift, the actual time required to perform the ordinary necessary services would not exceed one half thereof, the remaining time requiring no further effort than casual observance. Testimony was also to the effect that other mills of a similar size grade and character

were and could be operated by a one man shift. Time cards were required to be filled out at the end of each shift, none of which disclose a claim for overtime, such as is involved in this action.

The question of overtime allowance for alleged actual service rendered during the lunch period would present the only material question in this case if the same is one within the jurisdiction of this Court, as we view the law as stated by the District Court of Idaho in the case of *Sunshine Mining Co. v. Carver*, 41 Fed. Supp. 60, to state the law correctly that time off allowed for luncheon is not within time for which any payment can be recovered by an employee unless actual services were necessarily performed during that time for which he would be entitled to recover time and one half for overtime.

Whether operations of a mill for the reduction of gold and silver bearing ore to the form of bullion for transfer to a United States Mint and the subsequent transfer thereto, as required or authorized by laws of the United States, bring such operations within provisions of statutes having their basis in laws relating [20] to Interstate Commerce, presents the controlling question in this case—that of jurisdiction. It is clear that such operations and transfer do not come within the perview of commerce in the sense that it is used in statutes dealing with or affecting Interstate Commerce otherwise than means of conveyance may be used for such purpose. That defendant corporation was not

engaged in Interstate Commerce in the operations of its mill and the transfer of the products thereof and, hence, not subject to the provisions of the Fair Labor Standards, is in accordance with the recent decision of the District Court of South Carolina, Holland, Administrator of the Wage and Hour Division, United States Department of Labor v. Haile Gold Mines, Inc., 44 F. Supp. 641. See, also, T. 31 U.S.C.A. Chapter 8, p. 174 et seq., Cumulative Pocket Part For Use During 1943, #316c, 441, 448, 734, 734a.

It is the conclusion of the Court that the action should be dismissed. It is so ordered.

Dated this 27th day of January, 1943.

FRANK H. NORCROSS,
District Judge.

[Endorsed]: Filed January 27, 1943. [21]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL OR
RE-HEARING

Comes Now the complainants in the above entitled cause by Martin J. Scanlan, Esq., their attorney, and move the Court to vacate the opinion and decision heretofore entered dismissing the above entitled action, upon the ground that said opinion and decision conflicts with a controlling decision overlooked by the Court and to which attention had not been drawn through the inadvertence of coun-

sel and which decision was rendered by the United States Circuit Court of Appeals, Eighth Circuit, on June 30, 1942, entitled "Canyon Corporation versus National Labor Relations Board, 128 Fed. Rep. 2nd 953," and which one or more of the principles involved in the above entitled action is contained in the decision of the Circuit Court of Appeals and which the petitioner believes would affect the opinion and decision of the above [22] entitled Court; that the principles announced by the Circuit Court of Appeals, Eighth Circuit, are contained in syllabus 1 and 2 of said decision cited above and reads as follows:

"The production and shipment of gold bullion by a mine and refinery in one state for purpose of selling it to a United States Mint in another state is 'commerce' within the National Labor Relations Act, even though the United States may be the only customer to which bullion can legally be sold." National Labor Relations Act, Sect. 2 (6), 29 U.S.C.A. Sect. 152 (6); Gold Reserve Act of 1934, Sect. 1 et seq., Sect. 3, 31 U.S.C.A. Sect. 440 et seq., Sect. 442.

"Where petitioner in addition to producing gold bullion which it ships from South Dakota and sells to the United States mint at Denver, Colorado, sells and ships slag to a smelting company in Montana, and nearly half of materials and supplies purchased annually are transported to petitioner's plant from outside the state, the National Labor Relations Board properly considered all of those facts together and con-

cluded that petitioner's operations "affected commerce" within the National Labor Relations Act Sect. 2 (6), 29 U.S.C.A. Sect. 152 (6); Gold Reserve Act of 1934, Sect. 1 et seq., Sect. 3, 31 U.S.C.A. Sect. 440 et seq., Sect. 442.

Said motion will be made and based upon Rule 59a, Rules of Civil Procedure for the District Courts of the United States, which embraces therein grounds for re-hearing which were had under Equity Rule 69, 28 U.S.C.A., Section 723, the written opinion and decision of this Court and the record and files of said action.

Dated this 28th day of February, 1943.

M. J. SCANLAN

Attorney for Plaintiffs

NOTICE OF MOTION

To Thatcher and Woodburn, Attorneys for the Defendant:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the rooms of the United States District Court in the Postoffice Building in the City of [23] Reno, Nevada, on the 2nd day of February, 1943, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

M. J. SCANLAN

Attorney for Plaintiffs

(Receipt of Service.)

[Endorsed]: Filed January 29, 1943. [24]

[Title of District Court and Cause.]

DECISION AND ORDER DENYING MOTION
FOR NEW TRIAL

Plaintiff's motion for a new trial having been submitted, and the Court being fully advised in the premises, it is the conclusion of the Court that the same should be denied. While the opinion, heretofore filed, was based upon the conclusion that the Court was without jurisdiction, which remains the view of this Court notwithstanding the decision in the case of Canyon Corporation v. National Labor Rel. Board, 128 Fed. (2d) 953, by reason of the fact that the Board had for consideration not only shipments of gold and silver to a United States Mint as part of the results of its milling operations, but also, shipped slag therefrom and sold the same to a smelting company in another state. Although the question of jurisdiction involved in this case has not as yet reached a final decision by the Supreme Court or a controlling decision of this Court been rendered by the Circuit Court of Appeals of this Circuit respecting the question of [25] jurisdiction, it is, also the conclusion of the Court, that, irrespective of the question of jurisdiction, plaintiffs have failed to establish that they performed any substantial amount of labor during the lunch hour over and above that for which they received pay for overtime. The fact that their daily reports made no such claim is a circumstance to be considered together with the conflicting evidence submitted by the respective parties.

It is, therefore, ordered: That the motion for a new trial be, and the same hereby is, denied.

Dated this 25th day of February, 1943.

FRANK H. NORCROSS

District Judge

[Endorsed]: Filed February 25, 1943. [26]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled cause having come on regularly for trial beginning on the 21st day of October, 1942, and having been tried before this court without a jury, a jury trial having been waived, Martin Scanlan, Esq. appearing as counsel for the plaintiffs and the firm of Thatcher and Woodburn, by John P. Thatcher, Esq. appearing as counsel for the defendant and the Court, after hearing the allegations and proofs of the parties and being fully advised in the premises, now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

That the controversy between plaintiffs and defendant is one arising under and by virtue of the laws and the statutes of the [27] United States.

II.

That defendant is a corporation organized and existing under and by virtue of the laws of the State of Nevada and at all times mentioned in the complaint was engaged in the mining of gold and silver ores near the City of Fallon, State of Nevada; that the said gold and silver ores were reduced to precipitates by the cyanide process, the precipitates melted to a dore bullion, the same being a combination of gold and silver bullion; all of said processes of mining and reduction being within the State of Nevada; that said dore bullion was shipped by defendant by United States Mail to the United States Mint at San Francisco, California, and the value of each shipment of bullion was paid by said United States Mint to the said defendant.

III.

That beginning in the month of January, 1940 and ending on the 1st day of April, 1942 defendant had employed plaintiffs in this action for various periods of time in a mill for the reduction of gold and silver ores operated by defendant.

IV.

That none of the plaintiffs during his period of employment by defendant was engaged in commerce or in the production of goods for commerce.

V.

That the said mill of the defendant operated for a period of twenty four hours per day, divided into three shifts of eight hours each; that each of the

plaintiffs performed work, labor and services in said mill for a period of seven hours during the particular shift upon which he was working, and that each of the plaintiffs was free from duty for a period of one hour during [28] each shift for the purpose of eating his lunch; that each of said plaintiffs was paid in full by defendant at the rate of wages established by agreement between plaintiffs and defendant, which wage was in excess of that required by the Fair Labor Standards Act; that each of said plaintiffs was paid overtime at the rate of one and one-half times the amount of the agreed wage for all hours worked in excess of forty two hours a week during the period of employment from January, 1940 to October, 1940; that from October, 1940 to the termination of the employment of each of the plaintiffs each of said plaintiffs was paid overtime at the rate of one and one-half times the agreed wage for all hours worked in excess of forty hours per week.

VI.

That none of the said plaintiffs made any claim for overtime other than that paid by defendant during the period of his employment by defendant and that none of said plaintiffs made any claim for the payment of overtime until the making of demand upon defendant prior to the filing of the action in the present case, said demand being refused by defendant.

VII.

That none of the plaintiffs performed any work or labor for defendant during the lunch hour or at any

other time for which he did not receive pay for over-time at one and one half times the agreed wage . . .

VIII.

That the allegations contained in paragraph IV of the plaintiff's Amended Complaint are not true; that the allegations contained in paragraph V of plaintiffs' Amended Complaint are not true; that the allegations contained in paragraph VII of plaintiffs' Amended Complaint are not true. [29]

As conclusions of law from the foregoing facts, the Court finds:

I.

That there has been no violation of Sections 6 or 7 of the Fair Labor Standards Act, being Title 29 U.S.C.A. Sections 206 and 207, by the defendant, Summit King Mines, Limited.

II.

That plaintiffs are not entitled to the relief asked for in their Amended Complaint and that defendant is entitled to judgment herein.

III.

That defendant is entitled to recover of and from plaintiffs herein its costs herein incurred, taxed in the sum of One Hundred Thirty Seven Dollars and Sixty Eight Cents (\$137.68).

Let Judgment Be Entered Accordingly.

Dated: This 16th day of March, 1943.

FRANK H. NORCROSS

United States District Judge

(Receipt of service.)

[Endorsed]: Lodged March 10, 1943, O. E. Benham, Clerk. By O. F. Pratt, Deputy.

[Endorsed]: Filed March 16, 1943. [30]

In the District Court of the United States of
America, in and for the District of Nevada

No. 232

AL C. FOX, COLLISON GILBRETH, R. E. SUTTON, ORVILLE HUTCHINS, JOHN S. JONES, NEPHI N. DUSTIN, MERRILL C. HUTCHINS, H. M. CHILDERS, WARREN S. NORDEN, EDWARD F. O'NEILL, PHILIP EDGAR FERRIS,

Plaintiffs

vs.

SUMMIT KING MINES, LIMITED,

Defendant

JUDGMENT

The above entitled cause came on regularly for trial beginning on the 21st day of October, 1942 before the above entitled Court, sitting without a jury, a jury trial having been waived, Martin Scanlan, Esq. appearing as counsel for the plaintiffs and the

firm of Thatcher and Woodburn, by John P. Thatcher, Esq. appearing as counsel for the defendant; and the Court, after hearing the allegations and proofs of the parties and being fully advised in the premises and having made its Findings of Fact and Conclusions of Law wherein it finds that plaintiffs are entitled to take nothing by their complaint and defendant is entitled to judgment as hereinafter provided;

Now, Therefore, It Is Ordered, Adjudged and Decreed that plaintiffs take nothing by their complaint and that defendant have and recover from the said plaintiffs the costs of said [31] defendant herein expended, taxed in the sum of One Hundred Thirty Seven Dollars and Sixty Eight Cents (\$137.68).

Dated: This 16th day of March, 1943.

FRANK H. NORCROSS

Judge of the United States
District Court

(Receipt of service.)

[Endorsed]: Lodged March 10, 1943, O. E. Benham, Clerk. By O. F. Pratt, Deputy.

[Endorsed]: Filed March 16, 1943. [32]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS FOR THE 9TH CIRCUIT,
UNDER RULE 73 (b)

Notice is hereby given that plaintiffs above named

hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 16th day of March, 1943.

MARTIN J. SCANLAN

Attorney for all of the above
named plaintiffs
308 Lyon Bldg., Reno, Ne-
vada.

[Endorsed]: Filed May 27th, 1943. [33]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents: That we, Al C. Fox and H. M. Childers, as principals, and Commercial Casualty Insurance Company, of Newark, New Jersey, a New Jersey Corporation, as surety, are held and firmly bound unto the Summit King Mines, Limited, a Nevada Corporation, in the sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said Summit King Mines, Limited, a corporation, its attorneys, successors, or assigns, to which payment we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of May, 1943.

Whereas, on March 16, 1943, in an action in the District Court of the United States for the District of Nevada, between Al C. Fox, Collison Gilbreth,

R. E. Sutton, Orville Hutchins, John S. Jones, Nephi N. Dustin, Merrill C. Hutchins, H. M. Childers, Warren S. Norden, Edward F. O'Neill, Philip Edgar [34] Ferris, plaintiffs, and the Summit King Mines, Limited, a corporation, defendant, a judgment was rendered against the said plaintiffs and the said plaintiffs have duly filed a notice of appeal from said judgment.

Now, the condition of this obligation is that if said plaintiffs shall prosecute their appeal with effect and pay all costs if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation to be void, otherwise to remain in full force and effect.

AL. C. FOX (Seal)

H. M. CHILDERS (Seal)

(Seal)

COMMERCIAL CASUALTY
INSURANCE COMPANY OF
NEWARK, NEW JERSEY

By FRANK HASSETT

Attorney in Fact

State of Nevada

County of Washoe—ss.

On this 25th day of May, 1943, personally appeared before me, a Notary Public in and for the County of Washoe, Frank Hassett, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Commercial Casualty Insurance Company, of Newark, New Jersey, a New Jersey Corporation, and acknowledged

to me that he subscribed the name of the said Commercial Casualty Insurance Company, thereto as principal, and his own name as attorney in fact, freely and voluntarily and for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my seal at my office in said county and state the day and year in this certificate first above written.

(Notary Seal) M. J. SCANLAN

Notary Public. My Commission expires May 1st, 1947.

[Endorsed]: Filed May 27, 1943. [35]

[Title of District Court and Cause.]

ORDER TO TRANSMIT ORIGINAL TRANSCRIPT OF EVIDENCE AND ORIGINAL EXHIBITS TO THE CIRCUIT COURT OF APPEALS

It appearing to the Court that counsel for the respective parties have stipulated that the original transcript of the evidence filed in this Court together with certain original exhibits in lieu of copies thereof may be transmitted to the Circuit Court of Appeals for inspection by that Court;

It is Ordered that the original transcript of the evidence filed in this Court together with three time cards of each plaintiff, dated approximately three months apart, selected by the clerk at random from

defendant's exhibits E, G, H, I, J, K, L, M, N, O and P, and three solution sheet or work reports for each plaintiff selected by the clerk at random and dated about three months apart from defendant's exhibits C, D, and F be sent to the United States Circuit Court of Appeals for the Ninth Circuit in lieu of copies thereof.

Done In Open Court this 23d day of June, 1943.

FRANK H. NORCROSS

District Judge

[Endorsed]: Filed June 23, 1943. [38]

[Title of District Court and Cause.]

**MOTION TO EXTEND TIME FOR FILING
RECORD AND DOCKETING APPEAL**

Appellant shows to the Court as follows:

1. Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit was filed therein on the 27th day of May, 1943.

2. That counsel for the respective parties have made a stipulation designating portions of the record, proceedings, and evidence to be contained in the record on appeal.

3. The Clerk has been unable to complete the preparation of the record on appeal herein and will be unable to complete the same within the period of forty days from the date of filing of such notice of appeal for the reason that counsel for the respec-

tive parties have been unable to prepare the necessary papers for filing in the clerk's office and to give the clerk ample time within which to prepare the record.

Wherefore, appellant moves the Court for an order extending the time within which the record on appeal may be filed and the appeal docketed in the said Court of Appeals until the 25th day of August, 1943.

Dated this 23d day of June, 1943.

MARTIN J. SCANLAN

Attorney for Plaintiffs

[Endorsed]: Filed June 23d, 1943. [39]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL

Upon motion of counsel for the appellant it is the order of the Court that time for filing record and docketing appeal is extended to and including the 25th day of August, 1943.

Dated this 23d day of June, 1943.

FRANK H. NORCROSS

District Judge

[Endorsed]: Filed June 23d, 1943. [40]

[Title of District Court and Cause.]

STIPULATION DESIGNATING PORTIONS
OF THE RECORD, PROCEEDINGS AND
EVIDENCE TO BE CONTAINED IN THE
RECORD ON APPEAL

It is hereby stipulated by and between the parties hereto that the record on appeal herein shall consist of the following items:

I.

Amended Bill of Complaint filed October 15th, 1942.

II.

Answer to Complaint filed August 21st, 1942.

III.

Stipulation to the effect that plaintiffs may file an Amended Bill of Complaint and that the Answer theretofore filed may be considered as the defendant's Answer to plaintiff's Amended Bill of Complaint.

IV.

Stipulation pertaining to the issues of the case and that the evidence of the plaintiffs not present would be substantially the same as the plaintiffs testifying in certain respects, filed October 21, 1942.

[41]

V.

Opinion and decision of the District Judge, filed January 27th, 1943.

VI.

Motion for new trial or re-hearing, filed January 29th, 1943.

VII.

Decision and order denying motion for new trial, filed February 25th, 1943.

VIII.

Findings of Fact and Conclusions of Law, filed March 16th, 1943.

IX.

Judgment filed March 16th, 1943.

X.

Notice of Appeal to Circuit Court of Appeals, filed May 27th, 1943.

XI.

Bond for costs on appeal, filed May 27th, 1943.

XII.

Original transcript of testimony, filed October 27, 1942.

XIII.

Defendant's Exhibit A "Notice to Mill Employees on Daily Wage Basis".

XIV.

Defendant's Exhibit B "Attention to Mill Men".

XV.

It is further stipulated and agreed that the clerk may select at random from defendant's exhibits E, G, H, I, J, K, L, M, N, O, [42] and P,

three of such time cards for each plaintiff dated approximately three months apart. Also three daily work reports for each plaintiff selected by the clerk at random from defendant's exhibits C, D, and F, dated approximately three months apart and that such original exhibits may be sent to the Circuit Court of Appeals for the Ninth Circuit.

XVI.

Order to transmit to Circuit Court of Appeals original transcript of evidence, together with certain original exhibits.

XVII.

Motion to extend time for filing record and docketing appeal.

XVIII.

Order extending time for filing record and docketing appeal.

XVIX.

This stipulation designating portion of the Record, proceedings and evidence to be contained in the record on appeal.

Dated this 23d day of June, 1943.

MARTIN J. SCANLAN

Lyon Building, Reno, Nevada
Attorney for Complainants

THATCHER AND
WOODBURN

206 N. Virginia Street,
Reno, Nevada
Attorneys for Defendant

[Endorsed]: Filed June 23, 1943. [43]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT

United States of America,
District of Nevada—ss.

I, O. E. Benham, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of Al C. Fox, et al., Plaintiffs, vs. Summit King Mines, Limited, Defendant, said case being No. 232 on the civil docket of said Court.

I further certify that the attached transcript, consisting of 45 typewritten pages numbered from 1 to 45, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the "Stipulation Designating Portions of the Record, Proceedings and Evidence to be contained in the Record on Appeal" filed in said case and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid.

And I further certify that accompanying this record, in [44] accordance with order of this Court filed and entered June 23, 1943, is the original Transcript of Testimony filed October 27, 1942, and three time cards of each plaintiff, dated approxi-

mately three months apart, taken from Defendant's Exhibits Nos. E, G, H, I, J, K, L, M, N, O and P, and the following daily mill or work reports:

Reports of R. E. Sutton, E. F. O'Neill, Orville Hutchins, and one initialed AF, all taken from Defendant's Exhibit No. C;

Reports of R. E. Sutton, Orville Hutchins, E. F. O'Neill, H. M. Childers, and one initialed AF, all taken from Defendant's Exhibit No. D;

Reports of "AF", R. E. Sutton, H. M. Childers, and E. F. O'Neill, all taken from Defendant's Exhibit No. F.

And I further certify that the cost of preparing and certifying to said record, amounting to \$6.65, has been paid to me by Martin J. Scanlan, Esq., attorney for the appellants herein.

Witness my hand and the seal of said United States District Court this 12th day of August, 1943.

[Seal]

O. E. BENHAM

Clerk, U. S. District Court.

[45]

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY

TRIAL

Be It Remembered, That the above-entitled matter came on for hearing before the Court, sitting without a jury, at Reno, Nevada, on Wednesday, the 21st day of October, 1942, at 1:30 o'clock P. M., Hon. Frank H. Norcross, Judge, presiding.

Appearances:

M. J. Scanlan, Esq.,

Attorney for Plaintiffs

Thatcher & Woodburn

By John S. Thatcher, Esq.,

Attorneys for Defendant.

The Court: Counsel may make a brief statement.

Mr. Scanlan: This is under the wage standard act, in which we allege that the defendant produced ores in Nevada which were reduced to bullion and shipped to San Francisco in the State of California. The principal facts are that we intend to prove that the plaintiffs worked for eight hours' time, rendered services to the defendant corporation at their mill in Churchill County, Nevada, in reducing ores and minerals, and that they were only paid for seven hours' time and that one hour was de- [1*] ducted, which presumably the defendant will contend was for a lunch period, and they were only paid seven hours' shift which was at straight time, but if any overtime was worked, they were paid time and a half, and we are contending that the plaintiffs worked eight hours every day for six days a week and that they are still entitled to one hour overtime at time and a half compensation, and my understanding with counsel is that they are relying wholly upon the facts and we entered into a stipulation, which was filed in this court. This is not very lengthy and probably I had better read it. (Reads)

* Page numbering appearing at foot of page of original Reporter's Transcript.

“It is hereby stipulated and agreed by counsel for the respective parties that evidence pertaining to the issues involved in this case may be reduced by stipulations following, to wit:

I.

“It is stipulated that the defendant produced gold and silver ores in Churchill County, Nevada, and that the same were reduced to bullion and transported by United States Mail in interstate commerce from Churchill County, Nevada, to San Francisco, California, and that the bullion was sold to the United States Mint at San Francisco, California.

II.

“It is stipulated that the computations of the periods of time, number of days, rate of wages per day, was for seven (7) hours and rate of wages per hour was at the rate of seven (7) hours per day with time and one-half for overtime and the total amount [2] of compensation claimed to have been earned and unpaid as stated on pages 5, 6 and 7 of plaintiffs’ Amended Bill of Complaint are correct in accordance with plaintiffs’ theory of the case and need not be proven.

III.

“It is also stipulated that the testimony of the plaintiffs not present at the trial would be the same as the plaintiffs testifying as to the same character of work, mill routine, policy of management, making time and work reports and other evidence of a general nature pertaining to their

employment, and that they would also testify as to the number of days they were employed, the rate per day and the rate per hour at time and one-half and the total amount claimed to be unpaid, would be the same as itemized for each plaintiff respectively on pages 5, 6 and 7 of plaintiff's Amended Bill of Complaint."

I think that states the plaintiffs' case.

Mr. Thatcher: I will make my statement when we open with our evidence.

W. S. Morden, Al C. Fox, H. L. Childers, and John S. Jones were sworn as witnesses for the plaintiffs.

AL C. FOX,

a witness for the plaintiffs, having been sworn, testified as follows:

Direct Examination

By Mr. Scanlan:

Q. Mr. Fox, state your name for the record. [3]

A. Al C. Fox.

Q. Where do you reside now?

A. Fallon, Nevada.

Q. Have you ever been an employee of the Summit King Mines, Limited, the defendant in this case?

A. I have.

Q. When did you commence work for the defendant?

A. The 5th of January, 1940.

Q. How long did your employment continue with the defendant corporation?

(Testimony of Al C. Fox.)

A. Up until the 1st of April, 1942.

Q. In what capacity were you employed?

A. I was employed as a relief man in the mill.

Q. Will you explain what you mean by relief man?

A. Well, I relieved the mill men on their days off. As they only worked six days a week, I worked for each man on his day off, either on the ball mill or solution.

Q. When did the mill commence operation?

A. The 5th of January, 1940.

Q. Were you then employed? A. Yes.

Q. How many hours was the mill in operation during the day? A. Twenty-four hours.

Q. Continuously? A. Yes.

Q. When did the day shift commence?

A. Seven in the morning.

Q. And ended when? [4]

A. Three in the afternoon.

Q. What is the next shift called?

A. Afternoon shift.

Q. When did it commence?

A. Three p. m.

Q. When did it end? A. At eleven p. m.

Q. What is the next shift called?

A. Grave yard shift.

Q. When did that commence?

A. At eleven p. m.

Q. When did it end?

A. Seven a. m. the next morning.

Q. In what capacity in the mill were you first

(Testimony of Al C. Fox.)

employed? A. The first shift I worked?

Q. Yes.

A. I relieved the ball mill man on the first shift I worked.

Q. And you were engaged as ball mill man the first day? A. Yes.

Q. How long did you continue as ball mill man?

A. Just one day.

Q. Then what did you do?

A. I relieved the solution man the next day.

Q. How long did you continue with that?

A. Just one day.

Q. Then you changed around, is that it?

A. Then I relieved the ball mill man the next day.

Q. Now then I believe you testified that you discontinued your [5] employment in April, 1942, is that correct? A. Yes, sir.

Q. So you worked as an operating mill man, such as either solution mill man or ball mill man practically during that entire period of time?

A. Yes.

Q. And you are familiar with both capacities of employment? A. Yes.

Q. Will you state briefly the routine for the first hour of the day shift for a ball mill man?

A. Well, on going on shift in the morning, the first thing to do would be to check your tonnage and your classifier overflow gravity or ball mill density gravity and take a sample of classifier overflow for values and also for grind and take a

(Testimony of Al C. Fox.)

mill head sample, add your cyanide, and if lime is being added at the mill, add lime, and part of the time the ball mill man titrated the primary thickener solution for lime and cyanide. That was at the last part of my employment there, the ball mill man titrated the primary solution for lime and cyanide.

Q. Was that the usual routine for the first hour of the day shift?

A. Well, yes. It might vary. One man might weigh his balls for tonnage and do one chore before he did the other, but it just depended on how he was used to doing. There wasn't any set sample to take for the first hour, gravity or weight or anything like that.

Q. How long approximately would that routine take place?

A. Well, during the entire period; that is, outside of a few little changes. If they were adding cyanide, it would depend on [6] what kind of cyanide you were using. If you were using black cyanide and mixing it outside, of course you just attended to the addition of the dissolved cyanide in the mill, and if they were using white cyanide, it was added in the mill.

Q. Were there any other work or services that might develop outside of that routine?

A. Well, if things would go wrong in the mill, such as your power going off or your feed on the belt plugging up from an ore bin, get something in the ball mill scoop, the classifier overflow could

(Testimony of Al C. Fox.)

become plugged and run over on the floor, ball mill could become loaded by the grinding solution going off on the head of the ball mill.

Q. And that character of services which you have described continued during the remainder of the day shift? A. Yes.

Q. For how many hours? A. Eight hours.

Q. That was continuous, was it? A. Yes.

Q. When did you eat on the day shift?

A. Whenever we wanted to.

Q. How would you arrange for that time, by yourself or through any instructions, or what?

A. No, we would just eat whenever we would get hungry, whenever we wanted to eat or whenever you would have time to eat in other words. Whenever was the best time to eat would come, why we would eat.

Q. In other words, there was no fixed time, is that it? [7] A. No fixed time to eat.

Q. How many men were on a shift?

A. Two men on the operation.

Q. Was each man responsible for his own work or otherwise?

A. Well, each man was responsible for his own work, that is, in a way. The solution man was responsible for the operation of the mill, but each man done his own work, unless he needed help from his partner, and then he would call on him.

Q. Was each man relieved for a lunch period?

A. No.

Q. Now, in regard to the afternoon shift, between

(Testimony of Al C. Fox.)

three p. m. and eleven p. m., was the same routine followed? A. Yes.

Q. And the same character of work?

A. Yes.

Q. And is that also your evidence as to the grave yard shift between eleven and seven?

A. I would like to change that. There were some duties in the mill a little different on one shift than another. One shift might add balls to the ball mill and maybe the next shift would clean up the ball mill floor and around the ball mill, and the other shift would do the greasing and oiling, but outside of that the routine duties were the same on each shift.

Q. Were you required to file any reports?

A. Yes.

Q. What were they?

A. It was a mill report sheet.

Q. Of the work mill report? [8] A. Yes.

Q. I call your attention here to an instrument designated "Daily Report Agitating and Thickening, Shift No. 3", and call your attention to the signature down there of the operator, is that yours?

A. Yes.

Q. By initials? A. Yes.

Q. Now does this cover the entire operating period for that day? A. Yes.

Q. For that shift? A. Yes.

Mr. Scanlan: For the record, I would say this is dated March 29, 1940.

Q. This is another one of yours? A. Yes.

(Testimony of Al C. Fox.)

Q. Dated March 27, 1940. How many periods of time does that cover?

A. You mean the entire?

Q. Yes. A. Eight.

Q. That covers an eight-hour period?

A. Yes.

Q. Did the other one cover eight hours?

A. Yes.

Q. Is this another one? A. Yes.

Q. Dated March 25, 1940? [9]

A. Yes, that is another one.

Q. How many hours does that cover?

A. Eight hours.

Q. These are all solution reports?

A. All solution mill reports.

Q. I call your attention to another report which is designated, "Daily Ball Mill Report" and ask if that is your report? A. Yes.

Q. That is dated June 28, 1941. How many hours did that cover? A. Eight hours.

Q. I call your attention to another report dated June 26, 1941, and ask if that is your report?

A. Yes.

Q. How many hours does that cover?

A. Eight.

Q. I call your attention to another dated June 24, 1941, and ask if that is your report? A. Yes.

Q. How many hours does that cover?

A. Eight.

Mr. Scanlan: Will counsel stipulate that all of

(Testimony of Al C. Fox.)

the remainder of the reports signed by him will be practically the same?

Mr. Thatcher: No, we will not stipulate.

Mr. Scanlan: Do you want to go through the whole bunch?

Mr. Thatcher: No, but I won't stipulate they are the same.

Mr. Scanlan: Well, practically? [10]

Mr. Thatcher: Oh, as to form and type, yes, but I will not stipulate as to the entries.

Mr. Scanlan: Well, the entries wouldn't be the same, but that all his reports would be the same as to the evidence given as he described each type, solution mill and ball mill.

Mr. Thatcher: I will stipulate that all of Mr. Fox's reports on the file sheets would be on the same type of form and would be substantially the same as those.

Mr. Scanlan: I think that would be all right.

Q. Now, did you file any other reports of a different type?

A. No. The solution mill report when I worked on solution.

Q. These are the same as you testified before?

A. Yes.

Q. About the ball mill reports? A. Yes.

Q. You filed one according to the job which you happened to be working on for that shift, is that correct? A. Yes.

Q. Were there any other reports required to be filed by the men? A. No.

(Testimony of Al C. Fox.)

Q. Who kept the time?

A. I didn't understand what you said.

Q. Who kept the time, the time that you worked?

A. Do you mean who made out the time cards?

Q. Well, yes.

A. I would make out the time cards.

Q. I call your attention to these things designated "Surface Time Card", the first one of which is January 5, 1940, is that [11] yours?

A. Yes.

Q. How many hours were they put in for?

A. Seven hours.

Q. I call your attention to another time card made July 8, 1940, is that yours? A. Yes.

Q. How many hours does that call for?

A. Seven hours.

Q. I call your attention to this report card dated March 3, 1941, and ask if that is your card?

A. Yes.

Q. How many hours is that put in for?

A. Seven hours.

Q. I call your attention to this card dated September 24, 1941, and ask if that is your card?

A. Yes.

Q. For how many hours is that put in?

A. Seven—seven hours and eleven minutes.

Mr. Scanlan: Do you stipulate all these report cards cover the same each date they are supposed to cover?

Mr. Thatcher: I will stipulate they are the cards filled out by Mr. Fox personally from the beginning

(Testimony of Al C. Fox.)

of his employment to the end for each and every day.

Mr. Scanlan: That they are substantially the same?

Mr. Thatcher: No, not substantially the same. The time shown is different. Sometimes there is overtime shown on those cards in addition to the regular working hours, sometimes it [12] appears as a change in the working hours, after April 23, 1941, so they can't be the same.

Mr. Scanlan: You will stipulate they are the time reports kept by the company?

Mr. Thatcher: No, these time cards were made out by the men individually and were turned in.

Mr. Scanlan: And for the time reported?

Mr. Thatcher: Yes.

Mr. Scanlan: And that the evidence pertaining to all of them would be the same, with the exception perhaps of some one would have time and a half for overtime and others not?

Mr. Thatcher: I would stipulate this, that these cards correctly show the hours stated by the men to have been worked.

Mr. Scanlan: Just stated by the men?

Mr. Thatcher: Stated by the men to have been worked during that period.

Q. Now, Mr. Fox, will you explain the discrepancy between your work report cards of eight hours and your time card for seven hours?

A. Well, the time cards, we were notified to make them out for seven hours.

(Testimony of Al C. Fox.)

Q. And who notified you?

A. Well, the management.

Q. And was that followed generally throughout the entire period of your employment?

A. Yes.

Q. From the commencement until the end?

A. Yes, unless you worked two or three hours overtime or until [13] *until* eleven minutes was added on overtime, and then it was made out for seven hours and eleven minutes.

Q. When did that period commence that you mention, about the eleven minutes?

A. I can't say exactly. It was, I would say, along in the summer time of 1941.

Q. And how did that arise?

A. The men asked for a raise in pay. In fact, the miners all went out, walked out of the mine, and a committee was named, one mill man and two miners, to meet with Mr. Dobson to settle the question and it was settled by paying for eleven minutes at time and a half, eleven minutes for a solution man and twelve minutes for a ball mill man, which time and a half was approximately 25 cents, so this eleven minutes was added on to the seven hours.

Q. Did that make any difference in the working time of yourself and the other plaintiffs in the mill? A. No.

Q. Did it make any difference in the routine of the mill work for eight hours? A. No.

Q. Did it make any difference in the time which you took for lunch? A. No.

(Testimony of Al C. Fox.)

Q. Was there ever any time, during the course of your employment, where you were able to take an hour away from your work? A. No.

Q. Was there any time, during the course of your employment, that you were able to take 45 minutes away from your work? [14]

A. Not and do justice to your work.

Q. Was there any time, during the course of your employment, that you were able to take a half hour away from your attention to your work while in the employ of the company?

A. Well, I would say not.

Q. Was there any time that you could take any time away from attention to your work?

A. No, you had to have your mind on the mill all the time.

Q. Where did you eat your lunch generally?

A. Most of the time in the mill.

Q. And that was in close proximity to your work, wasn't it?

A. Yes, it was, you might say, in the middle of it.

Q. Did that interfere with your mill work in any way? A. Eating lunch?

Q. Yes.

A. Well, at times something would come up that would have to be attended to and you would quit, if you were eating lunch, you would quit eating lunch and go and attend to whatever it was.

Q. Was it possible for you to be parked any distance from the mill during any period of the eight-hour shift and give your attention to the mill?

(Testimony of Al C. Fox.)

A. No.

Q. Was your attention to your work services continuous during the entire eight-hour period?

A. It was, from the time you come on shift and relieve the other shift ahead of you, you were responsible for your work in the mill for the full eight hours.

Q. How many men were employed on the afternoon and night shifts? [15]

A. Two on each shift on the operation.

Q. Did you work with the other plaintiffs who are not present here today?

A. Yes, I worked with all of them.

Q. Was their routine of work and practice regarding eating lunch the same as yours?

A. Yes.

Mr. Scanlan: You may cross-examine.

Cross Examination

By Mr. Thatcher:

Q. Mr. Fox, have you worked in any other mills other than the Summit King? A. One other.

Q. Where? A. Midas, Nevada.

Q. What was the capacity of the mill?

A. Practically the same as this, about 75 ton.

Q. How many men were employed in the mill?

A. Two on a shift.

Q. For three shifts a day?

A. Three shifts a day.

Q. What is the capacity of this mill at the Summit King? A. I believe it is 70 tons.

Q. I believe you testified that you spent only

(Testimony of Al C. Fox.)

one day as a ball man and the rest of your time of employment as a solution man, is that correct?

A. No. This is what I meant, that I worked relief. There were two men on a shift, which would make six men operating, and I was the seventh, and as they only worked six days a week, I worked [16] for each man in rotation through the different shifts six days, thereby working for them as they had their day off. So, in other words, what I meant to say was on the first shift I went to work in the mill I relieved the ball mill man and the next shift I relieved the solution man, and that way all through until I worked for all six, and then I took my day off.

Q. What are the duties of the solution man?

A. To operate the solution end of the mill, take samples, do the titration, weigh the pulp, weigh the pumps for gravity and the agitators for gravity, take care of the Diesels, take care of the precipitation, see that the solution in the tanks is kept the right levels.

Q. What do you mean by take care of the Diesels?

A. Have to watch the switch board and see the Diesel was turned up the right revolutions to hold the average.

Q. You did no repair work? A. No.

Q. You had no part in the maintenance?

A. No.

Q. You did nothing more than watch the switch board?

A. Watch it and if anything went wrong correct it.

(Testimony of Al C. Fox.)

Q. You testified, I believe, you had to make report on the report sheet as to your duties, is that correct? A. Yes.

Q. How often were those reports required to be made?

A. Well, at the start the reports were made every two or three hours, when the mill started, and when Hr. Hunt was in charge of the mill, I don't believe there was any record noted only two or three or four times a shift. [17]

Q. About how much time did you consume in getting the data necessary to make one report?

A. Well, it probably would take about 30 minutes.

Q. How many reports a day did you make?

A. Of sheets do you mean?

Q. Of reports?

A. There was a record kept of about three or four but the samples and weights were all taken maybe more than eight times a day.

Q. Weren't you required to enter on the sheet the samples and weights when taken?

A. Not every hour on the start of the mill.

Q. How about after the mill started?

A. When Mr. Clawson took charge of the mill, why about that time we started keeping a record of the weights and overflow and titrations about every hour, I believe, about the time he took charge of the mill. And even at that, they might have been taken more than that, because if we changed the pump or something, we might check it two or

(Testimony of Al C. Fox.)

three times or once or twice in between, regarding the weight, to see that we got it right and rectify it if we hadn't.

Q. You spoke of certain difficulties which you might meet in the mill in the course of the day, what were those difficulties?

A. Well, the zinc feed would quit. You mean outside regular routine duties?

Q. Yes.

A. Well, well, the precipitation pump could kick off.

Q. How often did the precipitation pump ever kick off?

A. Well, sometimes three or four times a shift. When you get [18] the belt too heavy, the automatic switch would kick the precipitation pump off. The zinc feed, we had a lot of trouble on the start of the mill and always had to be watching because it fed into a cone and an emulsifier dried the zinc fed into this cone and mixed with the barren solution and that would fill up in the cone and plug up the feed end of the press.

Q. How much time did you actually consume in making the reports?

A. You mean just the writing?

Q. No, I mean in making the report?

A. In taking the samples and all?

Q. Yes.

A. I would say on an average of 30 minutes and look the mill all over and see that everything was all right.

(Testimony of Al C. Fox.)

Q. And you took about four of those a day?

A. We made a record of about four, but lots of times there were eight or ten taken and maybe more than that.

Q. Who prepared the time cards, Mr. Fox?

A. Who made them out?

Q. Yes. A. The man that signed them.

Q. You mean the men themselves, each one, prepared his own time card? A. Yes.

Q. When you first went to work at the mill, what was the rate of pay?

A. Six dollars for the solution men and \$5.50 for the ball mill men.

Q. And that was for a seven-hour shift? [19]

A. It was marked seven hours on the card.

Q. On the time card? A. Yes.

Q. How long did that rate of pay continue?

A. I believe it was up until the 22nd of April in 1940.

Q. Could it have been about June 12, 1940?

A. Well, I couldn't say for sure.

Q. What was done on or about that time you testified the change?

A. At that time there wasn't any transportation out there and the men were driving just two men in a car, so we appointed a committee of two to meet with Mr. Dobson to see if we could get a raise in pay to offset our driving 32 miles to work.

Q. Did you secure that raise in pay?

A. Yes.

Q. About how much?

(Testimony of Al C. Fox.)

A. Thirty-five cents.

Q. At that time did you make any complaint to Mr. Dobson about working eight hours and being paid for only seven hours? A. No.

Q. Did any of the men make any complaint that you know of? A. No.

Q. How long did those wages continue with 35 cents increase?

A. Up until the summer of 1941 that we spoke of.

Q. That would be about April, 1941, when you had that dispute?

A. Sometime along in the summer.

Q. What was the character of that dispute at that time?

A. Well, we wanted a raise in pay.

Q. Did you see the management about securing a raise in pay? [20] A. The committee did.

Q. Whom did that committee represent?

A. Miners and mill workers.

Q. Was it appointed by all the miners and mill workers?

A. The mill men appointed their representative and the miners, I imagine, appointed theirs.

Q. Did they secure the raise in pay?

A. Yes. Well, I wouldn't say it was a raise in pay. It was more money.

Q. You testified that was accomplished by changing the time—the men put on their time cards seven hours and eleven minutes for the solution men and seven hours and twelve minutes for the ball mill

(Testimony of Al C. Fox.)

men and the company paid overtime for the eleven and twelve minutes?

A. Yes. The pay remained the same, but we were paid 25 cents more a day.

Q. At that time were you notified there was any reduction in the lunch hour?

A. Well, yes, we were notified that we were to take 48 and 49 minutes off the customary hour.

Q. You were notified that you were to take 48 or 49 minutes off?

A. Well, we were notified that we were to add the 11 and 12 minutes that we had been docked out of the hour at time and a half, which made a quarter.

Q. At that time did you ever make any complaint to the management of the mine that you were being paid only seven hours' time for eight hours' work?

A. I didn't make any complaint, no.

[21]

Q. Did any of the plaintiffs make any complaint?

A. Not that I know of.

Q. Did any of the men at that time make any demand for overtime for that extra hour?

A. No.

Q. As I understand it, Mr. Fox, this wage rate payable after April 23, 1941, was the result of the agreement between the mine operators and the employees, is that correct?

A. Well, I guess it is.

Q. Was your attention ever called to any no-

(Testimony of Al C. Fox.)

tice posted by the management about April 23, 1941, in respect to lunch hours?

A. There were notices posted, yes.

Q. Where were those notices posted?

A. I believe in the change room and mill.

Q. Were they posted anywhere else?

A. I couldn't say. It might have been posted in the hoist.

Q. I hand you what purports to be a copy of notice to mill employees on daily wage basis, dated April 23, 1941, and ask you if that is the notice to which you refer? A. Yes.

Mr. Thatcher: I would like to offer this in evidence.

Mr. Scanlan: No objection.

The Court: It may be admitted.

Clerk: Defendant's A.

Mr. Thatcher: I would like to read this into the record, Defendant's A in evidence: (Reads)

“Notice to Mill Employees on
Daily Wage Basis

“To comply with the agreement reached April 22nd, [22] 1941 whereby overtime arrangements were to be made to enable employees to earn \$1.50 more per week, the following schedule has been worked out:

Solution men:

Your shift including the lunch period will be 8 hours as it always has but instead of taking one hour for lunch you will take 49 minutes.

On your time cards mark Daily rate \$6.35 but

(Testimony of Al C. Fox.)

under time worked put 7 hours plus 11 minutes overtime. This will result in an increase of \$1.50 per week.

Ball Mill Men:

Your shift including the lunch hour will be 8 hours as it always has but instead of taking one hour for lunch you will take 48 minutes.

On your time card, mark daily rate \$5.85, time worked 7 hours plus 12 minutes overtime. This will result in your earning \$1.50 more per week.

Men Earning \$5.25 Per Day:

Shift including lunch period will be 8 hours as it now is but instead of taking an hour for lunch take 47 minutes for lunch.

Mark your time card, Rate of Pay, \$5.25. Time worked 7 hours and 13 minutes overtime. This will result in an increase of \$1.50 per week.

Men Earning \$5.00 Per Day

Shift including lunch period will be 8 hours as in the past but instead of taking 1 hour for lunch take 46 minutes.

Mark your time card, Daily rate \$5.00, time worked 7 hours plus 14 minutes overtime. This overtime will amount to an increase of \$1.50 per week."

That is dated April 23, 1941.

Q. Mr. Fox, do you recall any other notice about April 23, 1941, relating to instructions for making out time cards? A. No, I can't recall.

Q. You don't recall whether such a notice was posted in the mill or not? [23]

(Testimony of Al C. Fox.)

A. I couldn't say.

Q. It might have been posted there?

A. It could have been, yes. There were lots of things tacked up there.

Q. As a matter of fact, the employees didn't pay much attention to them?

A. I wouldn't say that, no.

Q. And this might have been posted and overlooked?

A. It might have been there, but as I say, I couldn't recollect.

Q. I believe you testified you began your employment with the defendant corporation January 5, 1940?

A. I started working in the mill January 5, 1940.

Q. Do you recall notice dated December 29, 1939, and entitled, "Attention Mill Men. The Following Rules Will Be Observed In The Mill"?

A. If I could see it——

Q. I hand you what purports to be that notice and ask you if you can identify it? A. Yes.

Q. Was that posted in the mill?

A. Yes, on the office wall.

Q. Do you know how long it was posted there?

A. I couldn't say how long it was there, but I see it there quite a while. I will say a year anyway.

Q. It was there when you began working?

A. Yes, I will say it was there when I began work.

Mr. Thatcher: I should like to offer this.

Mr. Scanlan: No objection. [24]

(Testimony of Al C. Fox.)

The Court: It may be admitted.

Clerk: Defendant's B.

Mr. Thatcher: I should like to read this into the record please. Referring to Defendant's Exhibit B in evidence, this reads as follows: (Reads)

"Attention Mill men December 29th, 1939

The Following Rules Will Be Observed in the Mill:—

1. The solution man on shift will be in charge of the mill and will be responsible for same.

2. Men will work seven hours shifts, relieving each other one hour for lunch. For example; the ball mill operator will relieve the solution man from 11:00 to 12:00 and the solution man will relieve the ball mill man from 12:00 to 1:00. The operator relieving will be responsible for the other operator's work as well as his own. This applies except in the case of emergency, when other relieving hours can be arranged.

3. Time cards will be filled out for each man on shift and signed by the solution man. He will then turn them into the mill office.

4. For all major repair work call the Master Mechanic.

5. For any major trouble on the afternoon or night shift call the Mill Superintendent by phone at once.

6. The crusher man, before he starts crushing, will check over all motors and machinery for grease and oil. Any adjustments to be made will be made by the Master Mechanic. Report them to him.

(Testimony of Al C. Fox.)

7. Solution man will be responsible for the delivery of all samples to the Assay Office.

8. Each solution man will have two density cans. These are to be used for densities only. Glass flasks will be used to take samples for titrations. Take care of these cans.

9. Keep the mill and machinery clean.

10. All wages have been raised 25c a day by order of the General Manager as at the present time, there are no living accommodations at the property."

Q. Mr. Fox, did you eat your lunch every day while you were em- [25] ployed by the defendant?

A. Yes.

Q. What did your lunch usually consist of?

A. Oh, generally about three sandwiches, or three slices of bread I would say, made into sandwiches, and maybe a piece of cake or piece of pie and some fruit, that would be all.

Q. Where did you generally eat your lunch?

A. I generally ate my lunch right in the mill.

Q. What part of the mill?

A. Around the office on the titrating floor or inside of the office.

Q. About how long did you spend eating it?

A. I would say an average of about 15 minutes.

Q. Was that true of all shifts, Mr. Fox, that you worked?

A. As near as I know, yes. In fact, as I said, I worked with them all and it was just about the same, everybody took about the same time for

(Testimony of Al C. Fox.)

lunch. They didn't all eat in the office. Maybe some fellow would prefer to sit on a bench outside and eat his lunch or go over and sit down on the steps to the ball mill, or wherever they took a notion.

Q. Were you permitted to smoke in the mill?

A. Yes.

Q. After lunch would you have a smoke?

A. Sometimes. I would get up and go about my business and smoke.

Q. You always went about your business after eating your lunch? A. Certainly.

Q. In other words, it is your testimony that your routine was that you sat down, had your lunch, spent exactly 15 minutes—— [26]

A. No, I wouldn't say exactly 15 minutes, because I didn't time myself.

Q. What is the most time you might have spent on it?

A. Well, eating my lunch I would say 15 minutes, maybe ten—I would say from ten to twenty.

Q. So that your testimony would be that you spent twenty minutes at the most every day?

A. No.

Q. You might spend more?

A. No. I said it might be between ten and twenty minutes; I wouldn't state the exact time because I never timed myself.

Q. But at the most you never spent more than twenty minutes? A. I couldn't say that.

Q. You might have spent twenty-five?

(Testimony of Al C. Fox.)

A. I might have and might not have.

Q. You might have spent thirty? A. No.

Q. Never thirty minutes? A. No.

Q. Then we can say that at no time did you ever spend more than thirty minutes eating your lunch?

A. I never spent more than thirty minutes eating lunch—I said twenty-five, I believe.

Q. Would your testimony be, Mr. Fox, every day you were employed not more than thirty minutes after you began to eat your lunch you went back to your duties on the mill? A. Yes.

Q. And that was for each and every day you were so employed? [27]

A. Yes. There is something I would like to say so far as that goes.

Mr. Thatcher: Certainly, Mr. Fox.

Witness: While I was eating my lunch I was on duty I figured, because I was watching everything that was in sight and hearing of me while I was eating my lunch.

Q. You were watching everything in your sight and hearing? A. Yes.

Q. Mr. Fox, didn't you have rigged up near the office in the mill a little light which would turn red when anything went off in the mill?

A. I didn't have it rigged up.

Q. There was one there?

A. There was one there that operated more or less, I would say, for a while. I don't know how long.

(Testimony of Al C. Fox.)

Q. What was the purpose of that light?

A. That was to notify the ball mill man when his feed went off.

Q. As a matter of fact, the ball mill man did a good deal of reading on the office, did he not?

A. I don't think so.

Q. Did you ever see the ball mill man reading in there?

A. Well, I have seen everybody read, as far as that goes—maybe look in the catalog there or look back through the mill records to see what somebody else had been doing.

Q. Wasn't there a nice large collection of western stories magazines in the office?

A. No, there wasn't in the office.

Q. Where were they? [28]

A. Well, I couldn't say because I don't read Western Stories magazine.

Q. Did you see them around?

A. I seen one or two around there, yes.

Q. As a matter of fact, the men often read magazines on the job?

A. No, I wouldn't say that.

Q. You never saw them?

A. I would say that maybe somebody did read a magazine, but your question to me was did I often see them reading magazines. No.

Q. But you did occasionally?

A. Well, there was one or two who would read magazines once in a while, yes, but as a general rule the men didn't read magazines.

(Testimony of Al C. Fox.)

Q. Mr. Fox, after you had eaten your lunch, did you ever take five here and there during the day?

A. Just what do you mean by taking five?

Q. Well, it is an old mining term, meaning take a little rest.

A. Well, as I said, part of your work was circulating around to see that everything was operating all right, it wasn't actually working with your hands and you might say you were taking or you might be taking 15 minutes to go around the mill at times in addition to taking your samples, to see that the pumps were all operating and your solution levels were at their proper level in the solution bank and checking on things that could go wrong.

Q. Mr. Fox, wasn't it understood any time a man sat down and opened his lunch box, whether or not he had finished his lunch at any previous time, he was free from any duties?

Mr. Scanlan: Do you understand the question?

A. I don't exactly understand the question. Do you mean if a [29] man grabbed his lunch box and sat down any time during shift he was supposed to be eating his lunch?

Q. I mean was he subject to any duties at that time?

A. When he had his lunch box open?

Q. Yes. A. Yes.

Q. If a man sat down with his lunch box open, would the mill superintendent require him to do any work around there?

(Testimony of Al C. Fox.)

A. I have been called from my lunch to help start the compressor, different things in the mill.

Q. Would that occur very often?

A. I wouldn't say very often—a number of times.

Q. In case of breakdown in the mill, whose job was it to repair th breakdown?

A. The master mechanic.

Q. It wasn't the routine of the mill man?

A. No. He was supposed to report any breakdown that occurred.

Q. Mr. Fox, I call your attention to a document which purports to be the solution sheets for the month of March, 1940, of the defendant company's mill. Turning to the date March 29, 1940, Shift 3, I ask if that is your report? A. Yes.

Q. That was signed by you? A. Yes.

Q. Turning also to March 27, 1940, I hand you what purports to be a daily solution report and ask you if you can identify that?

A. Yes, that is mine.

Q. That is your signature? [30]

A. Yes, that is correct.

Q. Turning to March 25, 1940, I hand you what purports to be a daily solution report and ask you if you can identify that? A. That is mine.

Q. That is signed by you? A. Yes.

Q. Turning to what purports to be a daily solution report marked March 20, 1940, I ask you if you can identify that? A. That is mine.

(Testimony of Al C. Fox.)

Q. And one marked March 18, 1940, I ask you if you can identify that? A. Yes.

Q. And March 15, 1940?

A. That is mine too.

Q. That is signed by you? A. Yes.

Q. And this is the report of your activities during that day, as far as they were required to be written? A. Yes.

Q. And March 13, 1940?

A. That is mine.

Q. And March 11, 1940? A. Yes.

Q. That is signed by you also? A. Yes.

Q. And March 6, 1940? A. Yes.

Q. And March 4, 1940? [31] A. Yes.

Mr. Thatcher: I should like to offer this Solution Sheet Report for the month of March 31, 1940, in evidence with respect to all of the sheets therein contained and the signature of Al C. Fox, the witness.

Mr. Scanlan: No objection.

The Court: It may be admitted.

Clerk: Defendant's C.

Q. Mr. Fox, would you say that those solution sheet reports and the number of entries on those would be just about the same for each month of your employment as a solution man?

A. The entries on the sheets?

Q. Yes. A. No.

Q. Would there be more or less entries on there?

A. There would be more.

Q. When would there start to be more?

(Testimony of Al C. Fox.)

A. About the time Mr. Clawson took charge of the mill.

Q. And when was that?

A. Well, I would say along in July of 1940, or along about July.

Q. You would say July, 1940? A. Yes.

Q. Referring to solution sheet reports for the month of July, 1940, and referring to one dated July 31, 1940, I ask you if that is yours?

A. Yes.

Q. Referring to one dated July 29, 1940, I ask you if that is yours? [32] A. Yes.

Q. Referring to one marked July 26, 1940, ask you if that is yours? A. Yes.

Q. And July 24, 1940, ask you if that is yours?

A. Yes.

Q. And July 15, 1940, that is your report?

A. Yes.

Q. And July 5, 1940, ask you if that is yours?

A. Yes.

Q. And July 3, 1940, ask you if that is yours?

A. Yes.

Q. And July 1, 1940, and ask if that is yours?

A. Yes.

Mr. Thatcher: I would like to offer this in evidence.

Mr. Scanlan: No objection.

The Court: It may be admitted.

Clerk: Defendant's D.

The Court: We will take our usual recess for 10 minutes.

(Recess taken at 2:40 P. M.)

2:50 P. M.

MR. FOX

resumed the witness stand on further cross-examination by Mr. Thatcher.

Mr. Thatcher: Under our stipulation, Mr. Scanlan stipulated that these time cards were made out by Mr. Fox and that they date from the beginning to the end of his employment. We should like to offer these in evidence. [33]

Mr. Scanlan: No objection.

The Court: They may be admitted.

Clerk: Defendant's E.

Q. Mr. Fox, I believe you testified that there were times you were interrupted in your lunch, something going wrong with the mill?

A. Yes.

Q. How often did that occur?

A. I would say probably three times a week.

Q. What were the nature of these interruptions, breakdowns in the mill?

A. Well, I wouldn't say it was breakdowns. Maybe, to give an example, maybe the agitator overflow pump would be bothering or something, and maybe the bin would be bothering, quitting, or not carrying the load that was coming into the sump, and you would have to watch it for a few minutes, and maybe I would quit my lunch and walk down the catwalk to see if that was all right. That is just an example.

Q. Were you required to make a report on your

(Testimony of Al C. Fox.)

report sheets as to breakdowns or anything going wrong with the mill in the operations?

A. Anything of a serious nature, yes. It might be the pump had been bucking for two or three days. It was a known fact, probably, that it wasn't working good or something was wrong with it.

Q. But you were required to make a report on your report sheets as to——

A. The one who found it, yes, the trouble. [34]

Q. And you say you were interrupted about two or three times a week?

A. Yes, an average of two or three days.

Q. Turning to Defendant's Exhibit D in evidence for the month of July, 1940, July 29, 1940, I believe you testified that was your report? A. Yes.

Q. Do you find anything wrong there, anything went wrong with the mill on that day?

A. Yes. We had to go down for the slimes in the primary thickener.

Q. What time did that take place?

A. Well, 7:30 A. M. to 8:50 and 12:40 P. M. to 1:10 we were down.

Q. Would that have interrupted your lunch hour, Mr. Fox?

A. It might have because we ate lunch any time we wanted to. I might have been eating at that time.

Q. I turn to July 26, 1940, and ask you if you find anything there?

A. Yes, undoubtedly the mill was broke down when I went on shift, according to that report.

(Testimony of Al C. Fox.)

Q. Did you have anything to do with reporting it?

A. No, there wasn't any reporting to do. You see we had slimes in the primary thickener.

Q. Would that have interrupted your lunch hour or given you time off?

A. No, not given me time off because I am pretty busy when I go on shift and the same coming on grave yard; you have about an hour and a half or two hours' work, where you have to keep working all the time, take up your samples and dry and filter and titrate your solution and so forth and so on. [35]

Q. All of which is reported on your sheets?

A. No, that is what has to be done every shift.

Q. And that is reported on your report sheets?

A. No, I wouldn't report when I took samples.

The foreman always took care of the samples.

Q. Now, taking July 24, 1940, which I believe you identified as your report, do you find anything in there that would interrupt your lunch?

A. Well, went down at 4:00 p. m. to 5:00 p. m.

Q. Well, do you have to repair it if it went down?

A. No, down for slimes again.

Q. That would mean you were free that hour?

A. No, not necessarily. The rest of the mill was going. These were solution sheets and I was on solution and the ball mill man, his end of the mill was down.

Q. So that wouldn't interfere with your lunch at that time?

A. No.

(Testimony of Al C. Fox.)

Q. Turn to July 17, 1940, do you find anything there? A. Yes.

Q. What is that?

A. Outside bearing on press pump running hot.

Q. Would that interfere with your lunch?

A. It could, yes, if I was eating my lunch and I was watching this every few minutes to see that it didn't get too hot, it would naturally interfere with my lunch, because probably I would be eating my lunch and go down in the middle of my lunch or cut my lunch short in order to take care of it.

Q. Turning to July 15, 1940, do you find anything there? [36]

A. Yes, we were having trouble there.

Q. Would that interfere with your lunch?

A. It would just depend if I was eating lunch at that time.

Q. Turning to July 5th, do you find anything there?

A. There isn't—yes, there is too. Well, that isn't any trouble. It was probably an order to report that or the shift before or two may have been having trouble and when it cleared up I made a note of it.

Q. There was nothing there to interfere with your lunch?

A. Not in that notation there, no.

Q. Turning to July 3, 1940.

A. Well, the pump went out on the agitator, sump pump.

Q. Did you repair that?

A. Yes, I had a fellow that had been working

(Testimony of Al C. Fox.)

as a mill mechanic in the mill working with me on the ball mill and at that time Mr. Clawson was living 32 miles from the mill—he was the mill superintendent at that time—and so to keep from shutting the mill down until we could call him up, we went up in the warehouse and got a new case and put in the pump.

Q. Referring to July 1, 1940, do you find anything there? A. No.

Q. Who was the mill superintendent when you first went to work at the mill?

A. A man by the name of Mr. Sage.

Q. Was he on duty all three shifts?

A. I believe he was out there all the time as long as he was there. He might have gone to town once. He was there when the mill started. [37]

Q. Was he in the mill on all three shifts?

A. Yes, unless he had gone into town. I think he was out there most of the time starting the mill.

Q. He spent all three shifts in the mill?

A. Well, I couldn't say because I only worked on one shift in the mill.

Q. Was he around the mill all the time during your shift, whatever shift it might be?

A. He was only there two months after it started.

Q. Who was the superintendent after Mr. Sage?

A. Mr. Hunt.

Q. Was Mr. Hunt in the mill during all three shifts? A. No.

Q. On what shift was he there?

(Testimony of Al C. Fox.)

A. Day shift.

Q. Was there any one superior to the mill man during the afternoon and night shifts?

A. Not when Mr. Hunt was there.

Q. Who was the superintendent after Mr. Hunt?

A. Mr. Clawson.

Q. Was Mr. Clawson there during all three shifts?

A. After a time he was. At the start he lived in town; until they built him a residence out at the mill, he stayed in town and after they got his house finished he moved out to the mill.

Q. I mean was he actually in the mill during all three shifts? A. No.

Q. During what shift was he there?

A. Day shift. [38]

Q. He was not there in the mill during the afternoon or night shift?

A. Not unless he was called out or had to stay to do something.

Q. As far as these reports made on the solution sheets or on the ball sheets, was there any specific time at which they must be entered?

A. At that time there wasn't. There for quite a while we were supposed to make three or four records during the shift, recordings on the sheet. That is, I believe the ball mill made all the time, but the solution man was only required, those weights and titrations and whatever was taken, about three or four times a shift.

Q. What kind of a mill is that?

(Testimony of Al C. Fox.)

A. It is cyanide.

Q. Describe to the court what the general operation of that mill is, general type of operation.

A. The ore is brought into the mill and ground, into a ball mill, in a cyanide solution, and cyanide acts on the values in the ore after it is ground and dissolves the values into a solution, and then they are run through the mill and the pulp is washed and rewashed quite a number of times, until all the values are taken out of the pulp that can be taken out, and then the solution is mixed with zinc dust and run through a press and precipitated and the precipitates are taken out every so often and melted into bullion.

Q. So none of this operation, from the time the ore enters the mill until the time it is smelted into bullion, requires any amount of work on the part of the mill operator? [39]

A. Yes, it does.

Q. What is that?

A. Well, taking these samples——

Q. I am referring to the process itself.

A. You mean the mechanical process?

Q. Yes.

A. Cyanide has to be added and lime to hold the cyanide and alkalinity of the solution at a certain point, at whatever is decided is best to get extraction out of that particular ore, and you figure taking samples and weighing these cravities and greasing and oiling and all that pertains to helping the mechanical process along.

(Testimony of Al C. Fox.)

Q. But as far as the work of the conversion of the ore into bullion, the entire matter is handled by machinery, other than the addition of cyanide and determination of proper solution?

A. No, the press has to be cleaned by hand. Well, I guess mechanically, as far as that goes, the cyanide does the work, but the machinery has to be taken care of and the operation of the mill as it goes along, or the cyanide won't take the values out of the ore.

Q. Then as I understand the job of the mill man, he is a watcher and caretaker, isn't that so, of the machinery in there? A. No.

Q. What other duties has he in addition?

A. Has to take these samples and titrate and clean the mill, add fuel oil to the fuel oil tanks down at the Diesel engines and adjust the pumps. There are any number of things that have to be done. If they weren't done for a certain length of time [40] the mill would be haywire, your tails would go up and your heads down, in other words.

Q. How long could that mill run without any active part being taken by the mill man?

A. It might run 15 minutes one day and it might run eight hours.

Q. Would you say after running 15 minutes there was going to be a breakdown?

A. There certainly could be. The Diesel engines could go off.

Q. Do you have anything to do with the Diesel engines other than filling with fuel oil?

(Testimony of Al C. Fox.)

A. Have to check the feed and speed of the engines, yes.

Q. It is no part of your duty to care for the engines themselves?

A. No, not mechanically. The master mechanic takes care of them.

Q. You say your duty as mill man was to keep your mind constantly on the mill without interruption for eight hours?

A. I wouldn't say every second of time, like looking for a bomb to go off or something like that but you had to be on the job all the time because if some things went wrong in there, it would cause three or four hours' work or a loss in values or various things.

Q. As I understand it, Mr. Fox, there were two men on every shift in the mill? A. Yes.

Q. These men alternated as ball and solution men?

A. No, they were straight ball mill men or straight solution men.

Q. I understand from your testimony that you alternated? [41]

A. I alternated on their days off.

Q. No other man did so?

A. No, for the two years and three months I was there, I held the same job down.

Q. Do you know whether any other of the plaintiffs in this action alternated in their duties?

A. No, only some of them went to work in the ball mill as ball mill men and as vacancies occurred

(Testimony of Al C. Fox.)

they were moved up on solution because it was a little better job, more money.

Q. So as a matter of fact, all the men were equally acquainted with the duties of both jobs?

A. No, absolutely not.

Q. Your testimony is then that this mill required the constant attention of each man, two men in the mill, for eight hours during the day?

A. We will say because he was responsible for the work and if you let anything get away from you that was your hard luck.

Q. Was it ever possible for one man to take an hour out and the other man watch the mill?

A. There was quite a turn-over of men there in the mill and I can say there was nearly half I worked with called ball mill men were green men when they came into the mill and knew nothing about solution. They were broke in on the ball mill and some of them worked up to solution in time.

Q. As a matter of fact, most of these plaintiffs worked there for some period of time, did they not, Mr. Fox? A. Yes.

Q. After they were broken in, is it still your testimony one [42] man couldn't take an hour off?

A. Most ball mill men run the ball mill and never shown anything about solution until they work up to it and they have to be broke in.

Q. And it is your testimony also then that all of these men, all of these plaintiffs, spent a continuous eight hours watching those mills every day of their employment?

(Testimony of Al C. Fox.)

A. They were in the mill for eight hours, yes. They were taking care of the mill for eight hours.

Q. But you don't know whether or not they were actually performing mill duties?

A. Well, they weren't working like they would with a pick and shovel, continuously for eight hours, no.

Mr. Thatcher: That is all, Mr. Fox.

Redirect Examination

By Mr. Scanlan:

Q. Mr. Fox, is it customary for an experienced mill man to do all his work with his hands?

A. No, it isn't.

Q. How much mill work can a man look after or attend to without using his hands?

A. Why, I would say 50 per cent of his work is watching and knowledge, knowing when something is wrong.

Q. And keeping things from going wrong?

A. Yes.

Q. You said that every man was not acquainted with the other man's work on the same shift, that was your testimony, was it? A. Yes.

Q. And about how many of these men who are working in the mill [43] as operators would you say were inexperienced men?

A. You mean operating on the ball mill?

Q. Yes.

A. I would say the men I worked with, 50 per cent of them were inexperienced when they come in the mill.

(Testimony of Al C. Fox.)

Q. Would it be possible for the other experienced solution man to take time off and go away from his work for any length of time?

A. Well, no, it wouldn't.

Q. These report sheets which counsel showed to you, do those report sheets cover all titrations and samples that were taken during the course of a shift?

A. No, they don't.

Q. Why not?

A. Well, the recordings that show on those sheets are what was required on the sheet at that time, but in order to hold a certain gravity on a pulp, you might have to weigh the pulp, if you made a change, you might have to weigh that every 15 or 20 minutes or so to see when you had gained the point you were after.

Q. Was it required to be recorded on the report sheet?

A. The change that had been made?

Q. Yes.

A. After Mr. Clawson was in charge it was.

Q. What change was made in the practice after Mr. Clawson took charge?

A. Well, there were more recordings made on the mill record.

Q. Than previously? A. Yes. [44]

Q. Is there considerable difference in recording of the work done the early part of the operation of the mill than what was done during the latter part?

A. Yes, there was.

Q. And in what way?

(Testimony of Al C. Fox.)

A. Well, in the early part of the operation of the mill you wouldn't have to take as many tests, we will say, on the tray thickener as we had to take in the latter part of the operation of the mill, and I believe the weight, the gravities of the agitators was changed, the time for taking them, the number of times for recording them, and I believe at one time the mill sheet was changed, the layout of the mill sheet was changed. I think to start out with we had things on there that wasn't used and it was rearranged to get the records that were wanted.

Q. The forms? A. Yes.

Q. Counsel called your attention to a notice dated December 29, 1939, which is marked Defendant's Exhibit B. I call your attention to the first part of that notice, which reads: "The solution man on shift will be in charge of the mill and will be responsible for same." Was that rule observed all the way through?

A. The solution man was held responsible for the operation of the mill, his own work, and the ball mill man's work.

Q. "2. Men will work seven hour shifts, relieving each other one hour for lunch. For example; the ball mill operator will relieve the solution man from 11:00 to 12:00 and the solution man will relieve the ball mill man from 12:00 to 1:00. The operator relieving will be responsible for the other operator's work as [45] well as his own. This applies except in case of emergency, when other re-

(Testimony of Al C. Fox.)

believing hours can be arranged." Was that instruction followed out? A. No.

Q. In what way was it not?

A. Well, there wasn't anybody to relieve anybody else and nobody took the hour to start in with. For a couple of weeks, two or three weeks or so, in starting the mill, I don't think anybody had time to take an hour if they wanted to and after that it was never observed.

"3. Time cards will be filled out for each man on shift and signed by the solution man. He will then turn them into the mill office." Was that instruction observed by the mill men?

A. It was for a while, yes.

Q. Was it all the time? A. No.

Q. Was the failure of the mill man to observe these instructions known to the mill superintendent and to the management?

A. Well, they certainly were, they should have been. The cards have never been turned into the office.

Q. Was your attention ever called by the mill superintendent or the management to these rules?

A. To observe these rules?

Q. Yes.

A. No, only in that first one, where the solution man was responsible for the operation of the mill while he was on shift.

Q. But the relieving part of it wasn't observed by any one? A. No. [46]

(Testimony of Al C. Fox.)

Q. I also call your attention to paper entitled, "Notice to Mill Employees on Daily Wage Basis," dated April 23, 1941, and marked Defendant's Exhibit A. Were you in the employ of the defendant company on April 23, 1941? A. Yes.

Q. And were you working as a solution man around about that date?

A. Was I on solution that day?

Q. No, not that day, on or about that time?

A. Yes.

Q. And also as a ball mill man? A. Yes.

Q. I call your attention to the instructions: "Solution Men: Your shift including the lunch period will be 8 hours as it always has but instead of taking one hour for lunch you will take 49 minutes." Had you been taking an hour for lunch prior to April 23, 1941? A. No.

Q. Did this arrangement, noticed on April 23, 1941, bring about any change in the lunch period after that date? A. No.

Q. Again, "On your time cards mark Daily rate \$6.35 but under time worked put 7 hours plus 11 minutes overtime. This will result in an increase of \$1.50 per week." Did the rate of wages change at that time?

A. The day's pay didn't change. We got, as it says there, approximately \$1.50 more a week, or 25 cents a day.

Q. Was that why you put 7 hours on your time card? A. Seven hours and 11 minutes. [47]

Q. And eleven minutes. A. Yes.

(Testimony of Al C. Fox.)

Q. And what had you been putting in there previously? A. Seven hours.

Q. Was that also under instructions or under the practice of the mill?

A. It was under instructions.

Q. I again call your attention to statement: "Ball Mill Men: Your shift including the lunch hour will be 8 hours as it always has but instead of taking one hour for lunch you will take 48 minutes." Did that instruction make any difference in the practice of the work period in the mill?

A. No.

Q. Either prior to April 23, 1941 or after April 23, 1941? A. No.

Q. There was no difference? A. No.

Q. It says: "On your time card, mark daily rate \$5.85, time worked 7 hours plus 12 minutes overtime. This will result in your earning \$1.50 more per week." Did that make any difference other than the increase in wages?

A. No, it didn't make any difference, only we got \$1.50 more a week.

Q. It didn't make any difference in the working time? A. No.

Q. Now, again, "Men Earning \$5.25 Per Day: Shift including lunch period will be 8 hours as it now is but instead of taking an hour for lunch take 47 minutes for lunch." Did that instruction make [48] any difference after April 23, 1941?

A. No.

(Testimony of Al C. Fox.)

Mr. Thatcher: That has nothing to do with mill men, Mr. Scanlan.

Q. Did you ever work as a mill man under this \$5.85?

A. No, I got paid solution pay.

Q. Did the superintendent of the mill, or the management of the corporation, ever insist upon these instructions being followed by the men?

A. Only as far as filling out the time card.

Q. Otherwise they were not observed?

A. No. Of course, we got that extra money.

Mr. Scanlan: I believe that is all.

Re-Cross Examination

By Mr. Thatcher:

Q. Mr. Fox, did any member of the management of the defendant company tell you, or that you know of tell anyone else, that he could not take an hour for lunch?

A. No, it was never mentioned one way or the other.

Q. After April 23, 1941, did any employee of the Summit King Mines, or any officer or other person tell you, or any other man that you know of that, that he couldn't take 48 or 49 minutes?

A. No, all that was required was that we put that down on the time card as it instructed us to do.

Q. If you did sit down to lunch, were you at any time ever called to duty by the superintendent?

A. Yes.

Q. How many times?

(Testimony of Al C. Fox.)

A. That is hard to say. It is pretty near two years. Oh, I [49] couldn't state how many times. I have been called several times though while I was eating my lunch.

Q. That would have been on the morning shift?

A. Either the morning or afternoon.

Q. Were you ever called on the night shift?

A. Not the graveyard. No one was very seldom there on grave yard shift.

Q. Did Mr. Clauson ever call you to duty any time you sat down with your lunch box open?

A. Yes.

Q. On how many occasions?

A. That I stated I can't say, on several occasions.

Q. Do you recall a conversation with Mr. Clawson on March 30, 1942, the day you left the employ of the defendants, in the mill, to the effect that Mr. Clawson had never caught you any time loafing on the job with your lunch box open?

A. I don't recall that, no.

Q. You might have had that conversation?

A. No, I would say I didn't.

Q. Do you ever recall telling Mr. Clawson it would be hard for him to determine how much time the men took, as long as they had their lunch box open he didn't dare bother them?

A. No, I never said that, absolutely not.

Mr. Thatcher: That is all.

Mr. Scanlan: That is all.

MR. H. M. CHILDERS,

a witness on behalf of plaintiffs, having been sworn,
testified as follows:

Direct Examination

By Mr. Scanlan [50]

Q. Will you state your name?

A. H. M. Childers.

Q. Where do you reside, Mr. Childers?

A. Fallon.

Q. Have you ever been employed by Summit
King Mines, Limited? A. Yes.

Q. A corporation? A. Yes.

Q. When did your employment commence in
that corporation? A. In May, 1940.

Q. How long did it continue?

A. Until April, 1941.

Q. In what capacity were you employed?

A. Well, I went to work originally out there as
a ball mill man and I worked there, I can't state
just the length of time, then I was promoted to so-
lution man.

Q. How many years have you worked at mill
work, such as the Summit King Mines mill?

A. I couldn't give the exact time limit, but I
started in the mines and mills in 1916.

Q. Would you say about how many mills known
as cyanide mills that you have worked in?

A. Well, roughly speaking, I should say around
thirty.

Q. What is the custom with men employed in
mills, in respect to doing their work or rendering

(Testimony of H. M. Childers.)

services in a mill, insofar as applying their time is concerned? A. I don't quite understand.

Q. Well, I will reframe the question. What was the general [51] custom amongst mill men in working in a mill, as to whether or not they work with their hands all the time or done work with their minds?

A. Well, it was approximately 50-50. You work part of the time with yours hands and part of the time it is your knowledge that makes a mill run satisfactorily?

Q. And that is a part of a mill man's work, to keep the mill running so that is is not necessary to use your hands?

A. That is it, yes sir.

Q. What is the custom of mill men generally as to having a lunch period within which to eat their lunch?

A. Well, different mills vary on that. Most mills pay from the time you go into the mill until the time you come out and some mills, like the last one I worked for, which is the Desert Silver, they sent a man into the mill to relieve you and you went out of the mill and he assumed responsibility and signed the work sheet the same as you did during that hour.

Q. During your period of employment at the Summit King Mines mill were you ever relieved by another man in order to have time to eat?

A. Yes.

Q. How often?

A. Once a shift.

(Testimony of H. M. Childers.)

Q. I think you did not understand the question. Read the question.

(Question read.)

A. What do you mean by another man?

Q. Another man would come in and take your place? [52] A. Yes.

Q. Frequently?

A. For the mill was every shift I worked. We had an hour for lunch and he relieved us.

Q. That was during the afternoon and grave yard shifts? A. During every shift.

Q. Another man relieved you? A. Yes.

Q. Who generally relieved you?

A. Why it was a man that ran the crusher and he relieved all three of us. He worked three hours in the mill, one hour on day shift and one hour in the afternoon and one hour on grave yard, or two hours, relieved first the ball man and then the solution man, so that we each had a relief for one hour.

Q. Where did you go during the hour?

A. I had a house and went home and ate my meal and stayed the hour.

Q. Did that continue during the entire time of your employment?

A. Well, no, it didn't. When we first went up there we didn't have relief so we complained to the management about it and they immediately put this man on to relieve us.

Q. About when was that, do you know?

A. I couldn't state.

(Testimony of H. M. Childers.)

Q. Was it in the early part of your employment or middle?

A. The latter part of my employment.

Mr. Thatcher: This is all the Desert Silver.

Mr. Scanlan: Well, we are mixed up. I asked you about the Summit King. [53]

Witness: Oh, I misunderstood you. That was on the Desert Silver.

Q. I direct your attention now to the period of your employment with the Summit King Mines mill in Churchill County. Were you ever relieved there while in the employ of the company by another man? A. No.

Q. Did you ever take an hour off for lunch during the time of your employment with the Summit King Mines? A. No.

Q. Did you ever take three-quarters of an hour off? A. No.

Q. Or half an hour? A. No.

Q. Or did you ever take less than that away from your work? A. No.

Q. How many hours a day did you work?

A. Eight hours. There was no different jours; the same as in there.

Q. And you changed shifts, worked on all three shifts? A. Yes.

Q. Did you take part in any conference between the representatives of the men and the management of that company at any time?

A. Yes.

Q. About when was that, approximately?

(Testimony of H. M. Childers.)

A. That was in April, as I remember. It was before they changed that to seven hours and eleven minutes.

Q. April of what year? [54] A. 1941.

Q. And what was the purpose of that conference?

A. We asked for more money.

Q. And did you obtain results?

A. We got more money but they changed that lunch period from one hour, cut it down, was the only results, and paid us time and a half for that 11 minutes, and changed it from an hour to 48 minutes.

Q. Did it make any difference of time than just prior to that? A. Not a bit.

Q. Or afterwards? A. No.

Q. Whom did you represent?

A. The mill men.

Q. What was it, a committee?

A. So they had a meeting, the men met in the park at Fallon, the miners and mill men, and they talked back and forth and finally decided the best thing to do was to appoint a committee to meet with Mr. Dobson to see if they couldn't settle and they gave us power to settle any way we could and I was appointed the man to represent the mill.

Q. At that conference was there anything mentioned about a seven-hour day or seven-hour shift?

A. Yes.

Q. What was it?

(Testimony of H. M. Childers.)

A. I mentioned the fact that we were working out there eight hours.

Q. And to whom? [55] A. Mr. Dobson.

Q. What was his reply, if any?

A. I can't remember the exact reply, but as I remember it, he gave me a lot of figures on how the mill wasn't making any money and that they would have to shut down if they had to pay the raise.

Q. Was there anything said at that time about fair wages standard act?

A. Yes: I can't recollect what it was.

Q. Can you recollect the substance?

A. No, I can't.

Q. Was any change made in your time report after that?

A. On the time card, yes.

Q. Was that a change or no change?

A. It was a change?

Q. In what way?

A. We made our time cards for seven hours and eleven minutes.

Q. That was after April 23, 1941?

A. Yes.

Q. Did it make any difference in the working time? A. Not a bit.

Q. Let me ask you again, when did you go to work for the defendant corporation?

A. In May, 1940.

Q. I call your attention to this paper, which reads, 'Attention Mill Men,' dated December 29, 1939, and which is Defendant's Exhibit B, and ask

(Testimony of H. M. Childers.)

you to look that over. Are you familiar with that paper? [56] A. Yes.

Q. Where did you see it?

A. I have seen it tacked on the wall in the mill.

Q. I call your attention to the first portion of that: "The following rules will be observed in the mill: 1. The solution man on shift will be in charge of the mill and will be responsible for same." Was that instruction followed out? A. Yes.

Q. And "2. Men will work seven hour shifts, relieving each other one hour for lunch. For example; the ball mill operator will relieve the solution man from 11:00 to 12:00 and the solution man will relieve the ball mill man from 12:00 to 1:00. The operator relieving will be responsible for the other operator's work as well as his own. This applies except in case of emergency, when other relieving hours can be arranged." Was that instruction followed out? A. No.

Q. In what respect was it not?

A. Nobody relieved me at any time.

Q. Was there a man relieved the other men working in the mill as operators?

A. I couldn't tell only on my shift.

Q. But you were never relieved during the entire course of your employment? A. No.

Q: "3. Time cards will be filled out for each man on shift and signed by the solution man. He will then turn them into the mill office." Was that rule observed? [57]

A. It was part of the time. When I first be-

(Testimony of H. M. Childers.)

came solution man I used to sign the cards, then it got so nobdy signed them, none of the solution men signed them, so I didn't either.

Q. I call your attention to rule 7: "Solution man will be responsible for the delivery of all samples to the Assay Office," was that rule observed?

A. Yes.

Q. I call your attention to this paper entitled, "Notice to Mill Employees on Daily Wage Basis," dated April 23, 1941, and which is Defendant's Exhibit A.

A. Yes.

Q. You have seen this before, have you?

A. Yes.

Q. I believe you testified that you worked as a solution man and also as a ball mill man, is that correct?

A. Yes.

Q. I call your attention to instructions to "Solution Men: Your shift including the lunch period will be 8 hours as it always has but instead of taking one hour for lunch you will take 49 minutes." Was that observed?

A. No.

Q. In what respect was it not observed?

A. We simply worked the eight hours, the same as we always did.

Q. And also "On your time cards mark daily rate \$6.35 but under time worked put 7 hours plus 11 minutes overtime. This will result in an increase of \$1.50 per week." Was that observed?

A. Yes.

Q. Instruction to "Ball Mill Men: Your shift including the [58] lunch hour will be 8 hours as it

(Testimony of H. M. Childers.)

always had but instead of taking one hour for lunch you will take 48 minutes." Was that observed?

A. I wasn't the ball mill man there, but the ball mill man didn't observe that on my shift.

Q: "On your time card, mark daily rate \$5.85, time worked 7 hours plus 12 minutes overtime. This will result in your earning \$1.50 more per week." Was that observed?

A. Yes, that was observed.

Q. Did the 11 minutes for the solution men and the 12 minutes for the ball mill men make any difference in the period of a man's employment during any hour of the shift? A. No.

Q. Was it the same before April 23, 1941, as it was after April 23, 1941? A. Yes.

Q. When you went to work in the mill there, how did you make your time card out as to the number of hours?

A. I marked seven hours.

Q. Why? A. That was my instructions.

Q. From whom?

A. From the solution man I worked with. When I went to work in the mill I worked in with a man by the name of O'Neill. He gave me the rules I had to observe and one of them was to mark seven hours on my time card.

Q. Was that regardless of the number of hours you worked?

A. No, if I worked more than eight-hour shift, then I put down [59] overtime.

(Testimony of H. M. Childers.)

Q. But if you worked an 8-hour shift, what did you mark on your time card?

A. I marked 8-hour shift.

Q. Did you ever work less than eight hours during any shift. A. No.

Q. Did you work all three shifts; that is, you changed shifts, the same as the others?

A. Yes.

Q. Will you give a brief outline of the routine work for the first hour of the day shift?

A. For the ball mill or solution?

Q. Ball mill man shift.

A. Well, the first thing he did was to get his weight from the front end of the classifier; then he ran around to the back end of the mill and took a weight of the ore and also—well, he measured his belt, and took the weight of the ore and he added his cyanide and lime, checked up on the titrations for the solution and took two samples on the front of the mill, one for the grind and the solution that he turned over to the solution man.

Q. How much time would that take, approximately?

A. Oh, from 20 minutes to a half hour.

Q. And what would you be doing for the balance of the hour?

A. I would be staying close to the mill watching that it ran all right, or when I took my first tests, if they didn't suit me just right, I might check back on them two or three times during the hour.

(Testimony of H. M. Childers.)

Q. Was that the practice followed during the remaining seven [60] hours of the day shift?

A. It was, yes.

Q. Now, on the other shifts, was there any material difference in routine of work?

A. Only that one shift—there were three different jobs there, washing the floor and putting in the balls, and I don't remember what the other job was, but had it divided up so one shift put in the balls and one swept out and the other shift did something else—greased up.

Q. Were you kept busy during those shifts?

A. Well, not busy with your hands. You stood there and watched the feed. There was considerable trouble with the feed stopping once in a while, sticks and rocks coming down the feed, and he stood there where he could see that feed.

Q. Briefly describe the routine of the first hour of the day shift on solution.

A. On solution you had three agitators to check the densities and you had your primary thickener to check, the cyanide and lime and check it on your agitators also. You have a five-tray thickener which had to be checked and each tray for height of your slimes in the tray; had three cocks on each tray. Then you had a zinc feeder that *you* to open or fill with zinc, which was fed by hand, and it fed off on a belt and that had to be filled, so you check that first thing, then you check your Diesel for speed and for fuel oil, and that was about practically all.

Q. About how long would that take?

(Testimony of H. M. Childers.)

A. Around a half hour.

Q. What would you be doing the remainder of that time? [61]

A. Well, simply—the mill, the way it is situated, there was more than one floor, so we used to be able to walk up on the cat walk and look down on the other floor and we would usually walk back on that floor and in that way we could cover the whole mill and we would do that for maybe 15 or 20 minutes and maybe make a trip or two down to the other floor to look at it.

Q. Was that practically the same course followed the remaining seven hours of the shift?

A. On the day shift and afternoon it was. On the grave yard shift we had to take care of the samples. The samples that had been saved for 24 hours had to be dried and taken up to the assay office and that required approximately an hour and a half to filter them and dry them and take them to the assay office.

Q. Did you ever have any definite period off for lunch on any shift. A. No.

Q. How did you eat your lunch?

A. Well, I usually had it where I could see most of the mill.

Q. How much time would you take?

A. Well, I never times myself; I couldn't tell you just exactly. It doesn't take me very long to eat.

Q. Were you ever interrupted from eating your lunch. A. Yes.

(Testimony of H. M. Childers.)

Q. How often would you say?

A. Several times. I couldn't tell the number of times.

Q. Was it a practice for one man to relieve the other man in the operation of a shift?

A. No. [62]

Q. Could that be done conveniently and satisfactorily? A. No.

Q. Why?

A. Well, the ball mill men that they had at Summit King, most of them were inexperienced men and they weren't capable of running the solutions in the mill and the instructions said that the solution man was responsible for the mill at all times, and I don't know how the other fellows felt, but I didn't feel like turning responsibility over to somebody that was getting less money than I was during any time of the shift.

Mr. Scanlan: You may cross-examine.

Cross-Examination

By Mr. Thatcher:

Q. Mr. Childers, you testified you were employed at the mill of the Desert Silver in Nivloc?

A. Yes, sir.

Q. How long were you employed there?

A. I couldn't give you the exact time, 8 or 9 months.

Q. How many men were working in the mill at Nivloc? A. You mean operating?

Q. Yes, per shift. A. Two men.

(Testimony of H. M. Childers.)

Q. What was the capacity of that mill?

A. One hundred seventy-five tone.

Q. What is the capacity of the mill at Summit King.

A. Seventy ton.

Q. In other words, the mill at Desert Silver was twice as large as the one at Summit King?

A. Yes. [63]

Q. You testified also it was the practice there for the crusher man to relieve the mill men for the lunch hour?

A. Yes.

Q. Did he relieve both at the same time?

A. No.

Q. One at a time?

A. Yes.

Q. Was the crusher man an experienced mill man?

A. Yes.

Q. He was?

A. Yes.

Q. He was an experienced solution man?

A. Yes.

Q. And he had had mill experience before?

A. Yes.

Q. In every instance?

A. Yes.

Q. You had no hesitancy, when you were solution man at Nivloc, in having the crusher man relieve you?

A. Not a bit, because he took responsibility. He had to sign the ticket the same as I did.

Q. The mill didn't suffer any breakdown?

A. Not to my knowledge.

Q. At the time you were solution man, Mr. Childers, you were in charge of the shift, were you not?

A. Yes.

(Testimony of H. M. Childers.)

Q. And being in charge of the shift, you had power to tell the ball mill man what to do? [64]

A. Yes.

Q. You testified also that these ball mill men were inexperienced. For how long a period did they remain inexperienced after coming on the job?

A. As long as they are there, if they handle the ball mill without going around to see the rest of the mill, they could be there indefinitely.

Q. Isn't it a fact that the ball mill man was the solution man's helper? A. Yes.

Q. Doesn't he assist him in his work?

A. If he needs assistance he does.

Q. Isn't he familiar with his work?

A. No, not the technical end of it, no.

Q. You testified also that it was your practice during all of your employment to test the two or three agitators in the mill every morning the first hour on shift? A. How was that?

Q. There were three agitators in the mill, were there not? A. Yes.

Q. I believe you testified you ran tests from all three of the agitators?

A. I might have made a mistake there. I believe it was No. 1 and No. 3.

Q. Isn't it a fact after Mr. Clawson became superintendent he stopped all tests on No. 2 and 3 agitators?

A. He might have for a while, but I know I was taking them when I left, as far as I can remember.

(Testimony of H. M. Childers.)

Q. Mr. Childers, where did you eat lunch?

A. Well, there was a little stairway there just inside the mill that you could look over and get a picture of the mill and I used to sit on that stairway some of the time. Some of the time I ate it in that little office, wherever handiest; sometimes I sat in the window.

Q. How long after your shift began was it your custom to eat your lunch?

A. Whenever I got hungry.

Q. You didn't eat it any special time?

A. No.

Q. It might be one hour after shift began or two hours?

A. Yes.

Q. About what did you usually have for lunch?

A. Usually a couple of sandwiches and pie or fruit.

Q. You ate all that?

A. Yes. Sometimes I took home a sandwich.

Q. About how much time did you spend eating your lunch?

A. I couldn't say, I never timed myself, but I don't usually take long to eat at any meal. Probably 10 or 15 minutes.

Q. Could you have spent more than 15 minutes?

A. Not eating, no.

Q. What would you be doing the time you were not eating?

A. Watching the mill.

Q. So your testimony would be then that you never spent more than 15 minutes in the consumption of your lunch at any time?

A. Yes.

(Testimony of H. M. Childers.)

Q. Was there a change house connected with this mill? [66] A. Yes.

Q. Where was it?

A. Oh, it set up on the hill about, I don't know, 50 or 75 yards from the mill.

Q. Was it used by the men for the purpose of changing clothes when they came on and after shift?

A. Some of them.

Q. Did you use it? A. Part of the time.

Q. Isn't it a fact you usually went up there to change about half an hour before shift ended every day? A. Some of the time.

Q. You did that when you were solution man?

A. Yes.

Q. And you left the ball mill man in charge?

A. Well, I never took half an hour, no.

Q. Didn't you feel a little hesitancy in leaving that ball mill man in charge, Mr. Childers, being your responsibility? A. Yes, I did.

Q. And yet you did it very often, did you not?

A. No, not so often.

Q. You did it practically every day, didn't you?

A. No. I changed in the mill for quite some time.

Q. Most of the time you used the change house?

A. Well, about the year I stayed out there I might have used the change house one-third of the time.

Q. And the running of the mill didn't bother you a bit during that time? [67]

A. Yes, it did.

(Testimony of H. M. Childers.)

Q. You were worried about it but you left the ball mill man in charge?

A. That is one reason I started changing clothes back in the mill.

Q. You were hired by Mr. Clawson?

A. Yes.

Q. Did Mr. Clawson ever tell you when he hired you that he expected you to alternate your lunch hours with the other men on the shift?

A. Not to my recollection.

Q. Did you ever see that notice of December 29, 1939? A. I did.

Q. Where was it posted?

A. The one by Mr. Sage?

Q. Yes.

A. It was posted right in the mill on the board in the office.

Q. You made out your own time cards, Mr. Childers? A. Yes.

Q. Made out in your own handwriting?

A. Yes sir.

Q. While you were working as solution man, did you fill in the reports on the solution sheets?

A. Yes.

Q. Was there any rule of the mill as to how often they should be filled in?

A. Well, there were various rules. They changed rules seevral times out there. [68]

Q. What were the first rules, when you first went into their employment?

(Testimony of H. M. Childers.)

A. I couldn't tell you. I don't remember whether four or five during the shift we had to make report. We were supposed to do this work, but were not required to report only so many times during the shift.

Q. At first it was four or five times during the shift?

A. I believe so.

Q. It was changed later?

A. Yes, when I left there we had to fill it out every hour.

Q. That would mean that you had to take an agitator test or two and classifier overflow every hour?

A. Yes, I think so. I wasn't on the ball mill when I left there so I couldn't say for sure about that.

Q. I mean on the classifier overflow you were required to take a test on that overflow?

A. That was the ball mill man's side.

Q. How about the agitator?

A. Yes.

Q. You were required to take that every hour?

A. Yes.

Q. Did you do so every hour?

A. Yes. I might have missed once or twice.

Q. Just once or twice?

A. Well, a few times. I can't say how many.

Q. Well, about how many times?

A. I couldn't say. It wasn't many.

Q. About when did this period of making hourly entries begin, do [69] you recollect the exact date?

A. No, I couldn't. We had trouble with the tray thickener and Mr. Gray came up from the Desert Silver to try to straighten out for us and from that

(Testimony of H. M. Childers.)

time on we had to fill in our report every hour. The ball mill man, from the time I went to work there, he had to make reports every hour.

Q. Let us turn to the month of August, 1940, you were employed at that time? A. Yes.

Q. And you were working as a solution man at that time? A. I believe I was.

Q. Turn to August 31, 1940 and I will ask if that is your solution sheet for that date?

A. Yes.

Q. And August 30, 1940, is that your sheet?

A. Yes, that is right.

Q. And that is your signature? A. Yes

Q. And August 29, 1940, that is your signature?

A. Yes.

Q. Would you say that on August 29th you had any time for lunch, Mr. Childers?

A. There was no difference in the hours. When this mill is down that doesn't signify there isn't work for the solution man to do.

Q. August 27th, is that your sheet?

A. Yes.

Q. August 26th, is that your sheet? [70]

A. Yes.

Q. August 25th, is that your sheet?

A. Yes.

Q. August 24th, is that your sheet?

A. Yes.

Q. August 21st, is that your sheet?

A. Yes.

(Testimony of H. M. Childers.)

Q. So that all these sheets of the month of August signed by you would be your sheets?

A. I would say they are.

Q. Any one of those bearing your signature would be yours? A. Yes.

Mr. Thatcher: We offer these in evidence.

Mr. Scanlan: No objection.

The Court: They may be admitted.

Clerk: Defendant's F.

The Court: This case and court will be in recess until tomorrow morning at 10 o'clock.

(Recess taken at 4:12 P. M.) [71]

Thursday, October 22, 1942.

10:00 A. M.

Attorneys present as at previous session.

MR. CHILDERS

resumed the witness stand on further cross-examination by Mr. Thatcher.

Q. Mr. Childers, I believe you testified when you were working as a solution man you couldn't leave the mill with the ball mill man during your lunch because of his lack of experience, is that correct? A. Yes.

Q. Can you give the names of some of the men who worked with you as ball mill men when you were working on solution?

(Testimony of H. M. Childers.)

A. A man by the name of Green, I don't know his first name.

Q. Do you know whether Green ever had any mill experience? A. He told me he had not.

Q. Did you ever work with Mr. Fox

A. Yes.

Q. As a ball man? A. Yes.

Q. Did you feel Mr. Fox was so inexperienced you couldn't leave the mill in his charge?

A. No.

Q. You did not? A. No.

Q. Did you ever work with Mr. Ferris?

A. Yes.

Q. As ball man? A. Yes. [72]

Q. Did you ever feel Mr. Ferris was so inexperienced that you couldn't leave the mill in his charge? A. No, I never did.

Q. Mr. Ferris went to work as a solution man, did he not? A. No, he never.

Q. Not at any time?

A. Not that I know of. He worked as ball mill man at some other mill.

Q. He never worked as solution man at the Summit King?

A. He took the solution job after working with me.

Q. Did you ever work with Mr. Gilbreth?

A. I don't think I did, no.

Q. Did you work with Mr. Merrill Hutchins?

A. No.

(Testimony of H. M. Childers.)

Q. Did you ever work with Mr. Morden on the ball mill? A. No.

Q. Who else did you work with that you know?

A. Dustin.

Q. Did Mr. Dustin ever have any solution experience? A. No.

Q. Did he ever have any previous mill experience that you know of.

A. None, outside of the mechanical end of it. He was a mechanic.

Q. However, while you were working with Mr. Fox on the ball you never left the mill in charge of Mr. Fox while you took lunch? A. No.

Q. Did you fill out your own time cards, Mr. Childers? A. Yes. [73]

Q. And they are in your own handwriting?

A. Yes.

Q. I hand you what purports to be the time cards of May 18, 1940 through June 19, 1940, and ask if those are your cards?

A. Do I have to go through them all?

Q. Well, if you can identify them briefly.

A. All I see of them are mine.

Mr. Thatcher: I should like to offer these in evidence.

Mr. Scanlan: No objection.

The Court: They may be admitted.

Clerk: Defendant's G.

Q. Did you ever mark overtime on any of your time cards, Mr. Childers? A. Yes.

Q. What was that for?

(Testimony of H. M. Childers.)

A. Well, as I recall, we lined the ball mill once, or I believe it was while I was there and had overtime at that time, worked longer than eight hours, and we cleaned out the tray thickener once and I think I worked overtime that time.

Q. Were you ever disallowed any overtime when you marked it on your card? A. No.

Q. Did you ever mark any overtime for work done during the lunch hour? A. No.

Q. You testified yesterday, I believe, that you went to the change house often at the end of your shift? A. I believe I did, yes. [74]

Q. What did you do in the change house, Mr. Childers? A. I changed my clothes.

Q. Was there a shower in the change house?

A. Yes.

Q. Did you take a shower?

A. Sometimes.

Q. How long was that before the end of your shift?

A. We used to figure to go up there 15 minutes before the end of the shift; used to figure going up at quarter to three on day shift.

Q. At that time the other man on shift was left in charge of the mill? A. Yes.

Q. Did you ever do any reading during the 8-hour shift? A. Yes.

Q. What, in particular, did you read?

A. Well, they had different periodicals around there. They had the Mining Engineering and various magazines lying around. I might pick up and

(Testimony of H. M. Childers.)

read an article sometimes that was called to my attention, or I might pick it up and look at it.

Q. You usually brought your newspaper on the job, did you not, Mr. Childers?

A. No sir, I never brought a newspaper.

Q. Were there any other magazines other than scientific periodicals? A. Yes.

Q. What were those?

A. I don't recall what they were. [75]

Q. Did you often read those during your working period?

A. Not that I remember of, no.

Q. You never read anything other than scientific periodicals?

A. They had a lot of catalogues; I would look through them.

Q. How often a day did you do that?

A. I couldn't say that, how often in the day. I might consider everything was in good shape and I would be standing around where I could see the mill and I would pick up one of these and look through it a little.

Q. Did you ever sit down and read one of those magazines, periodicals? A. No.

Q. Did you ever sit down during the day, during shift? A. Yes.

Q. But you didn't read while you sat there?

A. On that question I might have been sitting or standing up. I never spent any length of time at it at any time.

Q. Did you ever take five at any time during the

(Testimony of H. M. Childers.)

day? A. What do you mean by taking five?

Q. Take a few minutes off work, smoke a cigarette?

A. There is no such thing as taking five. You are on the job where you can see. I smoked cigarettes when I felt like it.

Q. Was there any rule of the mill requiring you to use the change house? A. No.

Q. You did that at your own convenience?

A. Yes.

Mr. Thatcher: I think that is all. [76]

Re-direct Examination

By Mr. Scanlan

Q. Mr. Childers, you were asked questions about changing your clothes in the mill and you have also testified to changing them in the change house. Was that the continuous practice as to changing them in the change house at the time?

A. You mean by me or by all?

Q. By yourself.

A. As I stated yesterday, I changed about a third of the time I was there.

Q. Was there any particular reason for changing your clothes in the mill?

A. Well there was, yes.

Q. What was it?

A. We rode the bus to work and the bus came up to the mill and unloaded the men and our relief man was on that bus and he would come in the mill and I was to be ready to get on the bus or hold up the men from the mine, and so I had to be ready

(Testimony of H. M. Childers.)

for the bus within a matter of two minutes from the time that it arrived there.

Q. How long did that practice continue?

A. All the time the bus was running out there.

Q. Did the bus run all the time during the period of your employment? A. No.

Q. Do you remember when it commenced running?

A. I couldn't say. As I recollect, it was in the summer of 1940 some time.

Q. Will you explain again more completely the practice as to [77] the three shifts, change in shift?

A. Why the way they changed shifts, the man coming on would get off the bus and walk down to the mill in their street clothes and we would meet them in the door or inside the mill and if we had anything to tell them, we would tell them there and go on up and get on the bus. That was the custom of changing shifts and that was the way we were relieved. There was no time to waste there between shifts because the bus—if we held up the bus we were holding up about 25 men that were riding the bus from the mine.

Q. Were there any instructions posted or otherwise from the management, relative to being ready for the bus?

A. Not that I know of to go in from work, but there was a notice to the effect where we were to meet the bus going to work and the time we should meet it.

(Testimony of H. M. Childers.)

Q. Did the management have anything to do with the operation of the bus?

A. Not that I know of except that they took the bus fare out of our wages on the check and these notices were posted from the office—this notice that I recall was posted from the office, about where to meet the bus and at what time.

Q. Was there any other reason, other than what you have just stated, for changing your clothes in the mill?

A. Yes.

Q. What was it?

A. Well, as I said yesterday, I didn't care to leave the responsibility on somebody else that wasn't getting the money for it that I was and I didn't think was capable of handling it and [78] that is why I quit changing in the change room; and another reason, I seen one of the men that changed in the change room come down from the change room with a bedbug on him and from that time on I didn't change in the change room.

Q. Did the fact that you changed from your working clothes into street clothes in the mill have any effect upon your work or services?

Mr. Thatcher: Objected to as calling for conclusion of the witness.

The Court: I will permit it, subject to the objection.

A. No.

Q. While you were in your street clothes did you give your attention to your work the same as you did when you had your working clothes on?

(Testimony of H. M. Childers.)

A. Yes.

Q. Were there any occasions that you can recall where you had to attend to something in your street clothes?

A. Yes.

Q. What was it?

A. Well, there was one time that the clarifying tank run over and I had to go down to work on that in my street clothes, and another time I had to change an agitator, was beginning to stick, and I had to go down underneath and open a valve to start it again in my street clothes. That is two instances that I know of.

Q. Is it customary in mills around the country to have reading matter in the mills?

A. Every one I can recall it is. [79]

Q. Did you ever have any instructions in the Summit King mill against reading on shift?

A. No.

Q. While working as a solution man, was it customary to take the tests during the same hour or during each hour every shift?

A. As far as I was concerned, I used to try to get them on the hour so that I would have a regular routine and in that way I would eliminate any possibility of overlooking anything and I would know the condition of the mill better if I did it on the hour, but I couldn't say what the other men did.

Mr. Scanlan: That is all.

Re-Cross Examination

By Mr. Thatcher

Q. After making your tests, did you make entries of your tests on the solution sheet every hour?

(Testimony of H. M. Childers.)

A. If I was required I did. Some things you weren't required to report.

Q. What were those?

A. Checking the clarifying tanks and precipitation and looking after the zinc feeder and checking the zinc trays for values. That wasn't entered on the report sheet at all. That is all I recall now.

Mr. Thatcher: That is all.

Mr. Scanlan: That is all, Mr. Childers.

MR. WARREN S. MORDEN,

a witness on behalf of plaintiffs, having been sworn,
testified as follows:

Direct Examination

By Mr. Scanlan:

Q. Will you state your name please?

A. Warren S. Morden. [80]

Q. Where do you reside?

A. At Fallon, Nevada.

Q. Were you ever employed by the Summit King Mines, Limited, in Churchill County, Nevada.

A. Yes.

Q. When did you commence your employment with them?

A. Along about January 2nd, I believe, 1940.

Q. Was that when the mill commenced operation?

A. Yes, when it first started.

Q. When did you terminate your employment with the company?

A. April 26, 1940.

(Testimony of Warren S. Morden.)

Q. In what capacity were you employed?

A. As ball mill man.

Q. All the time? A. All the time.

Q. And what were your duties generally as ball mill man?

A. Well, the schedule hour by hour was pretty much the same. We would come on shift and generally I would check the density first on the classifier overflow and after I was sure of the density, I would go around and check the feed on the feed conveyor and then I would go on around the ball mill and look at the cyanide and see that it was dripping, had a little drip cock for a feeder, and go on around and look at the solution man's sheet the last titration for lime and cyanide; then I would generally go back and change my clothes. I had my clothes just below the ball mill floor. Then I would get my cyanide and weigh it up and generally I would check the tonnage. We had a little frame we placed on this feeder conveyor. It travelled about two [81] feet a minute, and we placed this frame on it and we would take this measured distance off the feed that lay on this conveyor and put in a box; then we weighed this box and computed the tonnage by the amount of feed that was taken off this feeder conveyor; and then I would generally go up and get the daily balls, the number of balls for the daily ball change. Well then, if the solution man had done his titrating to inform me of the lime and cyanide contents of the solution, then I would generally know how much lime to add or how much cyanide to add rather to build it up or let

(Testimony of Warren S. Morden.)

it drop. Then I would generally check the classifier overflow the second time, and that would just about complete my first round.

Q. You spoke about changing your clothes. Does that mean after you come on shift?

A. Yes sir.

Q. You mean you did some of your work in your street clothes?

A. I always on the start put my working clothes on after I made the rounds.

Q. How about after you ended the shift about changing clothes?

A. Well, at that time we were driving our own cars. We alternated. My partner, he would drive his car a week and then I would drive my car a week, so we alternated in that way to save on gas and rubber. We would generally change after we came off shift.

Q. Did you ride back and forth in your own or your partner's car all the time you were employed out there?

A. All of the time. The bus service hadn't been established yet.

Q. You left the employment before they put on the bus, is that [82] it? A. Yes.

Q. When would you eat your lunch on the day shift?

A. Well, that would vary. You see when I first went to work there everything was in pretty much of a turmoil, new mill just starting off and things were upside down, quite a number of things had to be

(Testimony of Warren S. Morden.)

ironed out, and we ate lunch when we got time. Lots of times we didn't get time to eat lunch at all. My partner went without lunch a number of times but I generally got a sandwich. That was when we first started, trying to get lime up and put in a ton of lime a shift or possibly more, and had to slack this lime and pack it up in the buckets and take care of the mill operation too.

Q. How long did you work on day shift; that is, how much time did you put in the mill on day shift?

A. You mean my average working time on shift?

Q. Yes.

A. Well, I was generally on my toes the full shift. I wouldn't say that I was always in a hurry after the mill was organized and running half way properly. There was more leisure time afterwards, but on the start we were on our toes, you might say, from the time we went on until the time we went off.

Q. When would you eat your lunch on the afternoon shift? A. Well, most any time.

Q. Where would you eat it?

A. Well, I generally ate my lunch right alongside the classifier up by the mill.

Q. And on the grave yard shift, when did you eat your lunch? [83]

A. Well, I ate that generally after I made my first round.

Q. Was there any time during your employment there that you took an hour for lunch or an hour for yourself? A. No.

Q. Was there any time that you took three-quarters of an hour for lunch or for yourself?

(Testimony of Warren S. Morden.)

A. Well, there might have been times when it would be three-quarters of an hour before I completed my lunch.

Q. Was that all taken up in eating of your lunch?

A. No sir. It was interrupted by some adjustment to be made or something to be attended to.

Q. Was there any time during your employment that you took as much as half an hour wholly for eating of your lunch?

A. No, it generally took me around 15 to 20 minutes to eat my lunch.

Q. Were you in a place where you could observe your work and what was going on during that time that you were eating your lunch?

A. Yes, I generally eat where I could observe the operation.

Q. How many hours did you put in during the afternoon shift on the solution or ball mill?

A. You mean actual time working?

Q. Yes. A. Well, it would be eight hours.

Q. And on grave yard shift? A. The same.

Q. I believe you testified you worked as a ball mill man all the time? [84] A. Yes.

Q. Did you ever relieve the solution man at any time? A. Ever relieve the solution man?

Q. Yes, for lunch or any other purpose?

A. Well, my partner sometimes would leave for a few minutes.

Q. Who do you call your partner?

A. Mr. Sutton.

Q. What was he?

(Testimony of Warren S. Morden.)

A. He was the solution man.

Q. All right, continue.

A. He would leave a few minues. He would generally tell me about it and notify me of those things that might go wrong or anything that was bothering, although he was a man that rarely ever left the mill.

Q. Did you ever relieve him for lunch on any shift, or any other solution man? A. No.

Q. What was your practice with reference to taking samples. Were they taken the same time every hour or every day or otherwise?

A. Well, for a long time we wasn't yet started in that routine but finally worked around where we were to take the samples on the hour, starting the hour, or we would take those samples in densities and record them on the sheet.

Q. Did you ever have any instructions as to how to take those or when to take them?

A. Well, yes, there were various orders. They would be changed from time to time. They were posted on the bulletin [85] board. It was quite a little while before they finally settled down to the routine where it was followed for any length of time. Generally the head sample was taken on the hour, due to the fact that it was the most important sample in the mill.

Q. Were there instructions from any one to that effect?

A. Yes, Mr. Dobson came down one day and inquired as to my method of taking the sample and

(Testimony of Warren S. Morden.)

I went thru the procedure to show him how the sample was taken and he advised me that the sample should be increased, that is, the amount should be increased, and I believe at the time we were taking the sample on the half hour; that is, what I mean, like we would go on shift at three o'clock in the afternoon shift, we would take the sample at 3:30, and he advised that the sample be taken on the hour, which order was carried out through, I believe Mr. Hunt, at the time, who was in charge.

Q. I call your attention here to a paper designated "Attention Mill Men", dated December 29, 1939, and ask if you have ever seen that or a copy of it?

A. Does the company have the original of this copy?

Mr. Thatcher: No, we haven't.

Q. Have you seen what would be the substance of that, another paper, another copy?

A. I didn't get you.

Q. O will withdraw that question. Did you see an original of what is contained in that?

A. Yes sir.

Q. By whom was it signed? A. Mr. Sage.

[86]

Q. Where did you see it?

A. Posted on the bulletin board at the office in the mill, at the dog house.

Q. How long was it there, if you know?

A. Well, to my knowledge it was still there when I left.

(Testimony of Warren S. Morden.)

Q. I call your attention to rule 1 of Defendant's Exhibit B, which reads as follows: "The solution man on shift will be in charge of the mill and will be responsible for same." Was that rule observed, to your knowledge?

A. Well in the sense that it generally is in a cyanide plant.

Q. "2. Men will work seven hour shifts, relieving each other one hour for lunch. For example; the ball mill operator will relieve the solution man from 11:00 to 12:00 and the solution man will relieve the ball mill man from 12:00 to 1:00. The operator relieving will be responsible for the other operator's work as well as his own. This applies except in case of emergency, when other relieving hours can be arranged." Was that rule observed or not?

A. No sir. It couldn't be followed under the set-up.

Q. And was it or was it not followed?

A. No, it wasn't followed.

Q. Do you know any reason why it wasn't followed?

A. Well no more than we couldn't afford to take that time off.

Q. Did you ever get any instructions from the management relative to observing that rule or not?

A. No.

Q. I call your attention to rule 3: "Time cards will be filled out for each man on shift and signed by the solution man. He [87] will then turn them into the mill office." Was that observed?

(Testimony of Warren S. Morden.)

A. For a while.

Q. For how long a while?

A. The solution man possibly followed that rule for, oh, I would say three weeks, possibly a month.

Q. And then did it change? Was the rule then changed? A. No. No orders to that effect.

Q. Was it changed in practice?

A. Changed in practice, yes sir.

Q. In what way?

A. Well, we just got to filling our own time cards. I'll tell you how that gradually worked around. Each man made out his own time card and signed it, would generally forget to make out the time card until late. I have often changed and permitted to leave the mill before I would make out the time card and go back and fill it out.

Q. How many hours would you put on your time card?

A. Well, I don't remember on the start, but it seems to me like I recorded eight hours for the first few days. Possibly I erased it and put seven on about the third day.

Q. Why did you do that?

A. Because that was the procedure that there mill followed. I was instructed by the solution man I was to put seven hours on.

Q. And you continued to do that up until the time you terminated your employment?

A. For the balance of the time.

Q. How many hours did you work each day that you filled in for seven hours? [88]

(Testimony of Warren S. Morden.)

A. Eight hours.

Q. I call your attention to another paper, Defendant's Exhibit A, entitled, "Notice to Mill Employees on Daily Wage Basis" and dated April 23, 1941, and ask if you have ever seen that or similar paper before?

A. Well, this was posted after I left there.

Q. You don't know anything about that?

A. No, I left there on approximately the 26th of April.

Mr. Scanlan: I think that is all.

Cross Examination

By Mr. Thatcher:

Q. Mr. Morden, you say that the practice of having the solution man sign the time card only ran for a period of about three weeks after you were employed?

A. I wouldn't be sure of the time, but it was carried on some time after they first started the mill.

Q. Was it carried on during all the time of your employment?

A. Now I can't say that. It is possible he would sign that time card that was made out, providing I had that time card made out when he was there.

Q. As a matter of fact, you don't know?

A. Well, to be truthful, no.

Q. When you testified three weeks, you testified to a fact of which you had no knowledge?

A. As far as I know he didn't sign those time cards after the first three weeks; at least, I paid no attention to it.

(Testimony of Warren S. Morden.)

Q. I hand you what purports to be time card June 14, 1940, two months after you began your employment, and ask you if that is signed by the solution man? [89] A. Yes.

Q. Whose signature is that?

A. Mr. Sutton's.

Q. He was solution man on your shift?

A. Yes sir.

Q. I hand you time card of June 13, 1940, and ask you whose signature is that? A. That is his.

Q. I hand you time card of June 12, 1940, and ask you whose signature is that?

A. That is his signature.

Q. And April 20, 1940? A. Yes.

Q. And March 9, 1940? A. That is right.

Q. You filled out these time cards yourself, Mr. Morden, all of them? A. Yes.

Q. As a matter of fact—

A. Now, I will withdraw that. It seems to me like my partner did make a time card or two, maybe more, that I overlooked.

Q. That is the solution man on the job?

A. Yes.

Q. But the balance of the cards you made out yourself? A. Yes sir.

Q. As a matter of fact, Mr. Morden, you were employed *between 2nd* and June 14th inclusive, were you not?

A. Approximately, I don't remember. [90]

Q. Of 1940? A. 1940.

(Testimony of Warren S. Morden.)

Q. And you didn't terminate your work in April? It was, as a matter of fact, in June.

A. Well then the company records aren't straight, because I was given my time by the company records.

Q. There are the company records, Mr. Morden, you may examine them and see if you wish to change your answer on that.

The Court: It will save a little time if you call his attention to certain dates.

Q. You testified you terminated your employment in April, 1940?

A. April 26th. Now understand I am arriving at that by the amount of overtime that was turned in by the company.

Q. Well, I hand you herewith time cards of April 22nd to June 18th inclusive, and ask you if they were filled out by you? A. Yes, that is my time card.

Q. Are all these the same? Just examine them briefly.

A. Apparently there is a time card Mr. Hunt made out.

Q. And these others?

A. Yes, those are all mine.

Q. As a matter of fact, with that exception, they are all made out by you to and including June 14th?

A. Yes.

Q. Would you say then that your employment terminated on June 14, 1940?

A. Well, I will say I am not positive on the date. I was figuring the time that I was discharged, according to the time that was turned in by the com-

(Testimony of Warren S. Morden.)

pany; that is, the overtime, and I com- [91] puted it at time and a half for that number of days, which would figure out, I believe three hundred—let's see, what was that—I haven't those figures in my head right now.

Q. So as a matter of fact, Mr. Morden, your testimony which you have given here relates then only to the period between January 2nd and June 14th inclusive, testifying only as to what happened in those periods?

A. No, I am testifying what happened the time I was employed in the mill.

Q. That is between January 2nd and June 14th?

A. No, the time I was discharged, April 22nd. As you say, I don't know.

Q. You also testified, I believe, that you marked eight hours on your cards for the first three days?

A. I didn't say positively I did. I said possibly I did.

Q. I hand you cards for the first three days of your employment, January 2, 3, and 4, and ask you if you can identify them?

A. There has been an erasure made on that seven there.

Q. You are positive, Mr. Morden?

A. It looks like it.

Q. Could it ever have been an eight?

A. Well, it might have been.

Q. Those have also been changed from eight to seven?

(Testimony of Warren S. Morden.)

A. No, those look like they are the originals.

Mr. Thatcher: I should like to offer these in evidence, if the Court please.

Mr. Scanlan: No objection.

The Court: They may be admitted. [92]

Clerk: Defendant's H.

Q. Did you bring your lunch to work, Mr. Morden? A. Yes.

Q. Every day? A. Every day.

Q. Where did you generally eat your lunch in the mill?

A. Oh, it was composed of sandwiches and fruit and boiled eggs and generally what was in the house in the way of lunch stuff.

Q. Where did you eat it?

A. I generally always ate my lunch when it was stormy in the mill alongside the classifier.

Q. About how long a time did you take for eating it?

A. Well, if I go straight through my lunch, I would say 15 or 20 minutes.

Q. About 15 or 20 minutes? A. Yes.

Q. At the time you sat down to eat your lunch, did you notify the solution man that you were going to start eating? A. No, it wasn't necessary.

Q. Who was in charge of the mill, as between the ball mill and solution man, the ball mill man or the solution man?

A. The solution man was in charge.

Q. But you never notified him when you sat down to eat?

(Testimony of Warren S. Morden.)

A. I was generally right in sight of him.

Q. Would it be possible for you to sit down and eat your lunch for a full hour or forty-five minutes and leave the mill in charge of the solution man?

A. No. [93]

Q. Did you feel, as did Mr. Childers and Mr. Fox, that the solution man did not have sufficient experience to run the mill in your absence?

A. No, my partner had experience.

Q. Will you explain why you did not feel you could sit down for any period of time?

A. Well, there were various reasons. The solution man had his duties to perform and his time was taken up pretty much with his own work and my time was taken up with my work.

Q. Is there any reason why the solution man couldn't perform for one hour your duties?

A. Well, he could, but I will cite an example of why the practice wasn't followed. We were mixing black cyanide on the outside above the mill. I notified my partner that I had to go up and mix cyanide. It was rather late in the afternoon. I was on day shift; and I also told him those points that might happen, those things that were giving trouble. It happened that we were running on rather heavy ore, had rather high gravity, and the ball mill circuit had a tendency to load up, and I notified my partner, Mr. Sutton, that it was time for it to load up. I was gone quite a little while out of the mill, mixing that cyanide. I had to drain

(Testimony of Warren S. Morden.)

the cyanide solution out of the tank that it was mixed in into a storage tank, then I had to fill that tank again and dump the cyanide in the mixing tank, and when I got back the circuit had overloaded dangerously; it was right on the point of sticking the classifier.

Q. I believe you testified also that your partner would leave the mill for a few minutes during your shift on every shift? [94]

A. That I could leave the mill?

Q. Yes and you testified also that your partner, the solution man, would leave the mill a few minutes every shift? A. Yes.

Q. And the mill would be left in your charge during his absence?

A. He would generally tell me the things to watch or were giving trouble, just as I done with him.

Q. And during his absence you would watch and attend to the duties? A. Yes.

Q. You found no difficulty in doing that?

A. Lots of the time it would be I couldn't take care of all his work, certain things were neglected, yes.

Q. But all during the period of your employment this practice of the solution man leaving the mill for a few minutes at a time continued, did it not? A. Yes, it was practiced.

Q. Now during your lunch hour did the solution man take his lunch at the same time you did?

A. Sometimes.

(Testimony of Warren S. Morden.)

Q. About how often, would you say?

A. Oh, I couldn't say to that.

Q. But at other times the solution man would eat at a different time than you?

Mr. Scanlan: Just say yes or no.

A. Yes.

Q. Mr. Morden, what experience have you had in mill work prior to coming to Summit King?

[95]

A. What type of experience are you referring to?

Q. I mean mill experience.

A. Around about twenty years, not continuously, but I would say around twenty years.

Q. Had that work been confined to ball mill work only? A. Any phase of the work.

Q. Solution work as well? A. Yes sir.

Q. So as a matter of fact, when you came on the job you were experienced mill man?

A. That is right.

Q. And you were capable of handling solution work, were you? A. Yes.

Q. So if your partner left you in charge of the mill, you were able to handle the solution work as well as the ball mill?

A. As far as my chances of taking care of all of his work was concerned, yes.

Q. Did you ever work with Mr. Childers?

A. No.

Q. Did you ever work with Mr. Fox?

A. Yes.

(Testimony of Warren S. Morden.)

Q. Did Mr. Fox ever leave you in charge of the mill when he went out of the mill?

A. Well, I don't remember how we worked together. It has been quite a little while.

Q. You don't recall that? A. No, I don't.

Q. Mr. Fox might have left you in charge of the mill some time [96] when he went out?

A. Yes.

Q. As a matter of fact, that was the practice of the solution man?

A. Well, the various mill men on different shifts had different practices. I can't state how we worked it every shift.

Q. Did Mr. Fox ever tell you you were so inexperienced he did not feel he could leave you in charge of the mill at any time?

A. No, not in words.

Q. You heard Mr. Fox's testimony?

A. Yes.

Q. You heard his testimony to the effect that he couldn't leave the mill in charge of the ball mill man because the ball mill men were all inexperienced, did you? A. Yes.

Q. Did you feel that applied to you, Mr. Morden? A. Well in answering that question——

The Court: Read the question.

(Question read.)

A. No, I didn't.

Q. You felt you were perfectly capable of running any branch of the mill, either as solution or ball mill man, because of your previous experience?

(Testimony of Warren S. Morden.)

A. Yes.

Q. Mr. Morden, did you use the change house?

A. I used the change house to put my clothes in for a while.

Q. What did you do in the change house?

A. Well, I just generally put my clothes in the change house. [97]

Q. Did you use it at the beginning or at the end of the shift?

A. Well, when I was using the change house, I would use it before and after.

Q. Both before and after, at the beginning and end of the shift? A. Yes.

Q. And at the end of the shift did you take a shower in there? A. Never took a shower.

Q. About how long before the end of the shift did you go to the change house?

A. Generally just at quitting time, or after.

Q. After quitting time? A. Generally.

Q. How long after quitting time?

A. Just as soon as the relief took over.

Q. You never entered the change house before the shift was over?

A. Well, I wouldn't say never.

Q. Did you take the bus from the mine to town?

A. There was no bus.

Q. I beg your pardon, there was not at that time. I think that is all.

Re-Direct Examination

By Mr. Scanlan:

Q. Mr. Morden, was the time card made out by

(Testimony of Warren S. Morden.)

you and signed by the solution man, or made out by you and signed by you also?

A. I generally made my own time card out and signed it.

Q. That was general all the way through, wasn't it?
A. Yes sir.

Q. Was it the general practice in the mill, while you were employed there as a ball mill man, for one man to leave the other [98] in charge of his work as well as his own?

A. It wasn't a practice. It was just in case of emergency.

Q. Was it the general practice for each man to attend to his own work wholly and by himself?

A. Well, we helped one another work on those phases of work which required help.

Q. But on the whole each man attended to his own work during the entire time?
A. Yes.

Mr. Scanlan: I would like to ask the witness, if I may, a question on direct examination.

The Court: I think we will take our 10-minute recess now.

(Recess taken at 11:00 o'clock.)

11:12 A. M.

MR. MORDEN

resumed the witness stand on further re-direct examination by Mr. Scanlan.

Q. Are you sure when you quit your employment with the Summit King Mines?

(Testimony of Warren S. Morden.)

A. No, I am not.

Q. So whatever your testimony may have been heretofore may not be accurate, is that right?

A. I couldn't say for sure.

Mr. Scanlan: Now let me ask a question on direct examination.

Q. Did you ever receive eight hours' pay for any shift during your employment?

A. No. [99]

Re-Cross Examination

By Mr. Thatcher:

Q. Did you ever fill out your time card for eight hours on any shift during your employment?

A. I stated that I wasn't sure.

Q. Did you ever claim or ask the company for overtime for the lunch hour? A. No.

Mr. Thatcher: No further questions.

Mr. Scanlan: That is all. I would like also to ask these other two witnesses on direct examination.

Mr. Thatcher: No objection.

MR. FOX

was recalled and testified as follows:

Direct Examination

By Mr. Scanlan:

Q. Did you ever receive wages for eight hours' work during the course of your employment with Summit King Mines?

(Testimony of Al C. Fox.)

A. No, not unless I worked over the regular shift.

Q. But I mean the regular shift? A. No.

Cross-Examination

By Mr. Thatcher:

Q. Any time you didn't work beyond the regular shift, did you ever put down eight hours on your time card?

A. Not on my time card, no.

Q. Did you ever ask the company to pay you for eight hours? A. Yes, I have.

Q. When was that? A. In this suit.

Mr. Thatcher: That is all. [100]

MR. CHILDERS

was recalled and testified as follows:

Direct Examination

By Mr. Scanlan:

Q. Did you ever receive eight hours' wages for a shift's work during the course of your employment with Summit King Mines? A. No.

Mr. Scanlan: That is all.

Mr. Thatcher: That is all.

Mr. Scanlan: Plaintiff rests.

MR. DOBSON,

a witness on behalf of the defendants, being first sworn, testified as follows:

Direct Examination

By Mr. Thatcher:

Q. State your full name please?

A. Percy Glenside Dobson.

Q. Where do you reside, Mr. Dobson?

A. Fallon, Nevada.

Q. What is your occupation?

A. Mining engineer.

Q. By whom are you employed at the present time?

A. Summit King Mines, Limited.

Q. Were you employed by the Summit King Mines at all dates mentioned in this complaint?

A. I was.

Q. And what is your capacity there?

A. Manager.

Q. And were you manager at all times mentioned in the complaint?

A. I was.

Q. What experience in mill work have you had, Mr. Dobson?

A. I have been following mining for twenty-two years and at two [101] other plants besides this we had cyanide mills and at two others we had flotation mills.

Q. As general manager of the defendant company, did you have general supervision over all of the mining operation?

A. At the Summit King?

Q. Yes. A. Yes.

(Testimony of Percy Glenside Dobson.)

Q. And that would include the mill, would it?

A. Yes.

Q. Did you ever make any inspections of the work in the mill at the Summit King?

A. I used to—I still do—I go out there two to three times a week.

Q. What do you do when you go out there?

A. I generally got out there slightly before the lunch period and I would work around in the mill, go over the records of the mill. We had the records there in the mill, and I would go over those and talk to Mr. Clawson, and then in the afternoon I would go down in the mine and come out of the mine possibly a half hour or forty-five minutes before the end of the shift, and I would spend that time in the change room with the mine superintendent.

Q. How long a time did you spend at the mill on these visits?

A. It varied from forty-five minutes to two hours.

Q. And during that period did you have an opportunity to observe these various plaintiffs that worked in the mill?

A. I think I observed all of them at various times.

Q. You have heard the testimony of Mr. Fox in this action? [102]

A. Yes.

Q. On your visits did you see Mr. Fox in the mill?

A. I see him in the mill, yes.

Q. During that period you were in the mill dur-

(Testimony of Percy Glenside Dobson.)

ing the lunch hour, did you ever see Mr. Fox eating his lunch? A. Many times, yes.

Q. Where'd he usually eat it?

A. Sometimes in the mill office and sometimes outside the mill office on the bench there and sometimes sitting on some steps.

Q. Do you know about how long a time he spent eating?

A. He was always leisurely and I would say, well, half an hour, well over a half hour.

Q. During the time he was eating his lunch did he ever get up and go around the mill?

A. I never once saw him get up and go around the mill.

Q. You heard the testimony of Mr. Childers?

A. Yes.

Q. Did you ever see Mr. Childers in the mill?

A. Not once.

The Court: You mean any time?

A. I beg your pardon, I thought you meant walking around. Yes, I seen him.

Q. You have seen him eating his lunch in the mill? A. Yes.

Q. Do you know about how long a time he spent eating his lunch?

A. A half hour or little better.

Q. And during that time did Mr. Childers get up and go around the mill? [103]

A. I can't recollect seeing him get up.

Q. You heard the testimony of Mr. Morden?

A. Yes.

(Testimony of Percy Glenside Dobson.)

Q. Did you ever see Mr. Morden eating lunch in the mill? A. Yes.

Q. Where did he generally eat his lunch when you saw him?

A. At the same place, sitting on those steps, on the bench, outside the office.

Q. Do you know about how long a time he took during the period you saw him?

A. Approximately the same time as the others, I would say.

Q. And while he was eating, did he get up and go around the mill?

A. I don't recall having seen him do so.

Q. Did you ever see Mr. Orville Hutchins in the mill? A. Yes.

Q. Did you ever see him eating his lunch there?

A. Yes.

Q. Do you know about how long a time he took?

A. About the same as the others. I would say Mr. Hutchins took a little longer than the others.

Q. About how long would you say that would be?

A. I would say he would take a good forty-five minutes and many times I seen him in the change room in his lunch period.

Q. Did Mr. Hutchins ever leave the mill during the lunch period that you know?

A. Yes, he did.

Q. Do you know where he went? [104]

A. Up to the change room.

Q. Any place else on the mine premises?

(Testimony of Percy Glenside Dobson.)

A. I don't remember any other place.

Q. Did Mr. Hutchins ever interrupt his lunch to look around the mill?

A. Not that I recall.

Q. Did you ever see Mr. Jones eating his lunch in the mill? A. Yes.

Q. Do you recall about how long Mr. Jones took eating?

A. He took about the same as the others.

Q. Did he ever get up and go around the mill while he was eating?

A. Not that I recollect.

Q. Did you ever see Mr. O'Neill in the mill?

A. Yes.

Q. Did you ever see him eating lunch?

A. Yes.

Q. Do you know about how long a time he took?

A. My recollection is that he took a little longer than the others.

Q. About how long would that be?

A. Forty-five minutes.

Q. Did you ever see him get up and go around the mill to attend to any duties while he was eating?

A. No.

Q. Did you ever see Mr. Sutton at lunch in the mill? A. Yes.

Q. Do you remember about how long Mr. Sutton took to eat? [105]

A. About the same as the others.

Q. And did he get up and go around the mill during the lunch period?

(Testimony of Percy Glenside Dobson.)

A. I don't recollect seeing him.

Q. Did you ever see Mr. Dustin in the mill?

A. Yes.

Q. How long did Mr. Dustin take in eating his lunch? A. About the same as the others.

Q. Did he ever get up and leave his lunch and go around the mill?

A. I don't remember seeing him.

Q. Did you ever see Mr. Ferris in the mill?

A. Yes.

Q. Did he ever get up and leave his lunch and go around the mill?

A. Not that I recollect.

Q. Do you know about how long he took to eat his lunch?

A. About the same as the others, approximately.

Q. When you went to visit the mill on these days, did the men eat together?

A. Very often, yes.

Q. Were there some days when there was only one man eating?

A. I have seen some days, yes.

Q. But on occasion would the solution man on duty be eating while the ball mill man was working?

A. Very often. Will you state that question again?

(Question read.)

A. Sometimes. [106]

(Testimony of Percy Glenside Dobson.)

Q. Do you recall any meetings with the mine or mill men at which wages were discussed?

A. Yes, in April, 1941.

Q. What was the occasion of that meeting?

A. They wanted more money. They said the cost of living was going up and they needed more money.

Q. Was any arrangement made with the men?

A. I told them that we couldn't increase the rate of wage but we could increase the time worked so that they would have an opportunity of earning more money.

Q. Did the men agree to that?

A. Yes they did.

Q. At that time did any one of the men mention the fact that they were working eight hours?

A. Not that they were working eight hours, no.

Q. Well, what was said?

A. If you refer to Childers, he said that they didn't need a full hour for lunch and they might as well get paid for it; they had to stay out there anyway, they had to be on the property at that time; they would like to get paid for it.

Q. What was your reply to that?

A. I told them they would get some kind of raise and I couldn't make exceptions for the mill.

Q. So far as the management was concerned, Mr. Dobson, subsequent to April 23, 1941, was it the position of the management the men were free for the forty-five minutes, their lunch hour?

A. That was very emphatically my instructions.

(Testimony of Percy Glenside Dobson.)

Q. Did you ever feel the men could be called to perform any [107] work during those periods?

A. No.

Q. Prior to April 23, 1941, was it the management's position that the men were free for the period of one hour? A. Yes, it was.

Q. And was it their position the men could not be called upon to perform any duties during that one hour?

A. If they did, they were to be paid for it.

Q. Was there ever any other conference with the men concerning wages?

A. Yes, they came to me, the mill men particularly came to me, and said inasmuch as the graveyard and afternoon shift had to come out in their own cars, we can't put five or six men in the cars like the miners do, so it costs us more to get out for gas and could we make some adjustment for them.

Q. When did that take place?

A. That took place in 1940.

Q. And what was the adjustment made?

A. I allowed the mill men, that is, men who had to come out in their own cars, I allowed them 35 cents more a day for compensating for only two of them being in their cars.

Q. During all of this period, from January 2, 1940 to June of 1941, did the men always use their cars? A. No, the bus came.

Q. Was that bus operated by the company?

A. It was not.

(Testimony of Percy Glenside Dobson.)

Q. What was the arrangement in regard to the bus?

A. The bus was operated by a trucker in Fallon named Lewis and [108] we agreed with the men, and the men all signed an agreement, whereby we were allowed to deduct from their wages 50 cents a shift for riding out to the mine and turned that over to the bus operator.

Q. Was the bus supposed to leave at any particular hour?

A. No, just as soon as the men were ready. It didn't have a definite schedule, never posted.

Q. In other words, it only left after the men were ready to take it? A. That is right.

Q. What is the capacity of the mill at Summit King Mines?

A. From the start of operations it averaged 54½ tons per day.

Q. What is its actual operating capacity?

A. We hope to get 70 tons out of it, but we have never averaged that.

Q. So that it always ran under average capacity?

A. That is right. We consider it a 70-ton mill, but it never averaged 70 tons.

Q. Have you ever made any examination of any mill similar in size to the Summit King Mines mill?

A. Many of them, yes.

Q. Can you state any particular one?

A. Well, one in particular was the Westgate

(Testimony of Percy Glenside Dobson.)

Milling Company, situated about 25 miles out the highway from us, and we examined that mill before we built our own mill, for the purpose we had in mind that we might rent that mill and work the ore out there until we decided whether or not our property warranted putting up a mill, and we went into that fairly carefully. It has [109] approximately the same flow sheet as ours.

Q. How about its average handled?

A. Forty-five tons, I think is what it is rated.

Q. How many men were employed per shift at Westgate?

A. They had one man per shift, except on day shift, when they had a general roustabout crew on repair work and things.

Q. Do you know of any other mills of comparable size to Summit King?

A. Not the same size as Summit King, no.

Mr. Thatcher: You may inquire.

Cross-Examination

By Mr. Scanlan:

Q. You testified that you went out to the mill about two or three times a week? A. I did.

Q. And that was generally on the day shift, was it not?

A. Practically always on the day shift.

Q. And on such occasions you saw those different men eating their lunch? A. Yes.

Q. And you said that each of them took approximately a half hour for their lunch?

A. Yes.

(Testimony of Percy Glenside Dobson.)

Q. And that they didn't leave their lunch and take a walk around the mill during that time?

A. I don't recall ever seeing anybody get up and walk around the mill.

Q. They knew you were present at the mill on those occasions, did they not? [110]

A. Of course they did.

Q. And you knew that they were taking this time to eat their lunch, did you not? A. Yes.

Q. Did you ever speak to them about it?

A. It was never my practice to speak to the men individually. I always passed my orders on to Mr. Clawson.

Q. Did you ever pass such orders on to Mr. Clawson to instruct the men not to take so much time for lunch?

A. Will you repeat that question?

(Question read)

A. Not to take so much time? No, I never did. In fact, what I discussed with Mr. Clawson was that the men did not have enough work to keep them occupied.

Q. Then it developed into a general practice there that the men could eat their lunch when and where they wanted and take as much time as they desired, is that true?

A. Well, certainly if they had taken more than the hour we would have drawn their attention to it, but the fact is that we knew that they were changing and taking showers on the company time.

(Testimony of Percy Glenside Dobson.)

We figured they took approximately half an hour at the end of the shift, so we figured there was an adjustment there due the men if they didn't take quite a full hour.

Q. Did you ever try to change that practice of the men taking less time for their lunch?

A. You mean taking less time?

Q. Than they were taking.

A. Do you mean did I want them to take a shorter period for [111] lunch, is that what you mean?

Q. Yes. A. No.

Q. So that the management at least acquiesced in the time that the men were taking to eat their lunch?

Mr. Thatcher: Objected to as calling for conclusion of the witness.

The Court: I think it should be limited to the witness himself.

A. Let me ask you what you want me to say now?

Q. As I understand, you were the general manager of the company? A. Yes.

Q. And you acquiesced or permitted to continue the practice of the men as to the time they would take eating their lunch?

A. I figured that the men were taking their full hour, considering the time they took for showers and the change.

Mr. Scanlan: I move the answer be stricken as not responsive to the question.

(Testimony of Percy Glenside Dobson.)

The Court: I think it is explanatory, but you can limit the question.

Q. Will you limit it to the lunch period?

(Question read)

The Court: Answer yes or no and then you can make any explanation.

A. I will say I asked that no changes be made because they took a full hour, considering their changing and taking a shower.

Q. Did any of the men take a full hour for their lunch period?

A. They may have done so; it is quite possible. [112]

Q. Do you know of any men taking a full hour for their lunch?

A. I have been told, Mr. Clawson has said——

The Court: Just what you know.

A. I never sat there with a watch and timed them. I seen them at the end of their lunch period. I seen the men get up at the end of the lunch period, but I wouldn't say whether or not they had started it right on time. I never timed them with a watch, no.

Q. In other words, your statement that these men were taking a half hour for lunch was, as you fixed it, approximately?

A. I always spent more than a half hour in the mill office and the practice was that they were there as long as half an hour or longer.

Q. You were in the mill office looking over reports and records, were you not?

(Testimony of Percy Glenside Dobson.)

A. And I walked over the mill too and looked at various workings.

Q. Would it be possible for the solution man to leave his lunch and walk around the mill without your knowing it, even though you were in the mill?

A. It might be possible, but as I say, I never saw—I can't recall ever seeing—it and I wouldn't think if he made a practice of doing that in all the time I have been out there I wouldn't notice it some.

Q. Would it be possible for the ball mill man to leave his lunch and go to some other part of the mill and attend to some work and return to his lunch without your knowing?

A. Of course it would be possible, but I say I never seen that done. [113]

Q. Was there any arrangement made, whereby each man, engaged in the operation of the mill, could take a full hour off to himself and use that hour as he saw fit?

A. Absolutely. That was my instructions; they could do anything they want and the only way we could have kept them from that was to chase them out of the mill for the full hour and I didn't feel we should do that.

Q. Do you know of any of the men taking a full hour off by themselves?

A. Well, I have seen Hutchins do it and I have seen O'Neill do it.

Q. But isn't it a fact that all of these men that you observed in the mill eating their lunch

(Testimony of Percy Glenside Dobson.)

were at a place where they could observe the greater part of the mill in which he was in charge?

A. No, because sitting in the office there they couldn't see anything and sitting outside the office the solution man couldn't look at the conditions, at the press or at the tray thickener or at the agitators. He could only see approximately one-fifth of the part, maybe one-sixth of the part, he had to supervise.

Q. Is this the same office where you mentioned you signed the reports?

A. The same office, yes.

Q. So that you would not be able to observe what the men were doing from that same office, would you?

A. No, but I could observe if they were sitting outside there.

Q. You don't know what the practice was on the afternoon or grave yard shift in respect to eating lunch?

A. No, I do not. I assume—I have—well, I can't say from my own observation, no. [114]

Q. You have had charge of a number of mills during the course of your work as a mill manager?

A. I have had charge of two, but there have been mills at plants where I have been, but I have not been manager up there.

Q. But you know of the practice in such mills, do you not? A. Yes.

Q. And isn't it the general practice, Mr. Dobson, in mills that run continuously for the twenty-

(Testimony of Percy Glenside Dobson.)

four hours to employ men on three eight-hour shifts?

A. If you are talking about mills I managed, one in Mexico it was the practice for half of the shift to go home to their homes and eat their lunches while the other half stayed. That was in Mexico—I can't think of the name of the mine.

Q. Well, isn't it a general practice, Mr. Dobson, where mills run continuously for twenty-four hours, for the men to eat their lunch while on shift?

A. Well, it seems to me it all depends whether or not if the man comes from a long distance, to eat his lunch he would do it on shift, otherwise he would go home. You can understand a man wouldn't want to go home to Fallon to eat his lunch.

Q. It would be impractical for a man to go any place away from the mill while he was employed there for eight-hour shift?

A. It would be very practical to go any place he wanted. It would be a matter of comfort and the mill was probably the most comfortable place. It was the cleanest and warmest and they didn't have to go so far.

Q. Where, for instance, could he go?

A. To the change room if he wanted to. [115]

Q. What could he find there that would occupy his time?

A. There was very little to occupy his time there.

(Testimony of Percy Glenside Dobson.)

Q. There was practically no other place to go that he could use his time to any advantage to himself, is that true?

A. To his own advantage no, unless he could relax walking around, smoke, and chatting.

Q. But while he stayed in the mill he was at a place where he could give the company the advantage of his presence at any time, is that true?

A. If it was asked for, yes.

Q. And if he wanted to volunteer, could he not do so?

A. Any man who worked extra time, all he had to do was put it on the time card and we paid him for it.

Mr. Scanlan: Will you read the question please?

(Question read)

A. If he wanted to volunteer, certainly.

Q. And wasn't it generally customary during the time that he was in the mill to voluntarily attend to any work he might see needed attention?

A. No, not during his lunch period.

Q. Did you ever know of a man, while he was eating his lunch, neglect any part of the work in his portion of the mill?

A. That mill was run for many hours without any attention, the mechanical end of the mill. If the taking of records were neglected, it wouldn't show up in our records at all. I mean, if he took a solution reading at two o'clock and another ten

(Testimony of Percy Glenside Dobson.)

minutes after, we wouldn't know about that, and if he put that 10 minutes three o'clock, it would be just the same. We would [116] have no record.

Mr. Scanlan: Will you read the question please?

(Question read)

A. I say he wasn't attending to it. I would say he was neglecting on walking around, if that is what you call it. If you mean was he neglecting any of his instructed duties, I would say—

Q. No, I mean neglecting the operation of the mill, being neglectful of the operation of the mill.

Mr. Thatcher: Objected to. It assumes a fact not in evidence; something like the question of having stopped feeding your wife.

The Court: Read the question again.

(Question read)

A. While he was eating his lunch he had no responsibility so he couldn't neglect any work.

Q. In operating a mill, Mr. Dobson, isn't it a fact that something might occur very suddenly in the operation of the machinery or in the flow of pulp or ore which might be damaging to the company?

A. Oh, certainly, anything like that might happen.

Q. Do you know of anything like that that did happen while any of the men were eating their lunch?

A. No, I can't recall anything. I have seen the

(Testimony of Percy Glenside Dobson.)

ball mill, the liners in the ball mill being changed and things like that, but that is just routine repair work.

Q. Well, my question is directed to the operation of the mill. A. Yes. [117]

Q. Did any of the men ever turn in extra time for any extra work during their eight-hour shifts?

A. They never put it on the time cards, not within that eight hours, no. They put it in for overtime, of course, when they worked longer.

Q. Did anybody turn in time for overtime during the shift period from seven o'clock in the morning until three p. m.? A. No.

Q. Never did? A. Never did.

Q. And so far as you know the company never paid them for any work which they might have done during the period that they were eating lunch?

A. Well, I will adjust that as to that last question, my answer, I should say. I can't say whether they were given—if they put on the cards that they worked during the lunch hour, I can't say whether or not they ever did that, but if they did, they were certainly given time for that lunch hour if they worked, if they put it on their cards as not getting a lunch hour.

Q. Did any of these men engaged in the operation of the mill ever receive eight hours' wages between the 2nd of January, 1940, and the 22nd of April, I believe, 1942?

(Testimony of Percy Glenside Dobson.)

A. I couldn't say. They would if they put it on their time card for eight hours.

Q. But so far as you know, none of them ever received eight hours wages?

A. No, I wouldn't say so far as I know. There is no reason why—I didn't look at all the time cards. [118]

Q. Don't you know, of your own knowledge, that these men did perform services for the company during every hour of the eight-hour period which they were in attendance at the mill?

A. No.

Q. Can you tell any that didn't?

A. Well, all of them during their lunch period didn't perform any.

Q. You don't know of any of them giving any service during the lunch period, is that right?

A. What was the question?

(Question read)

A. I don't know any of them that gave any service; I can't recall it.

Q. You testified you observed several of these men taking approximately half an hour for lunch. Will you state what they did with the other half hour during the same hour?

A. The other half hour was taken up in taking a shower. That was towards the end of the shift.

Q. That isn't the question.

(Question read)

A. Well, I can't recall what they did. I don't

(Testimony of Percy Glenside Dobson.)

know whether they attended to their duties or talked or what they did. I presume they probably looked after some of their duties part of the time.

Q. In other words, while you observed them for a half hour eating their lunch, it is your belief or opinion that they attended to their duties for the other half hour?

A. I said they might have been. I didn't say that was my be- [119] lief. I said there is a chance they did.

Q. Do you know whether the men did or did not give a half hour after they finished their lunch to duties in the mill?

A. I don't know whether they did or they did not.

Q. Now with respect to the change room. You say the men took a shower bath every day?

A. I can't say every day because I wasn't out there every day, but I can say I have seen all of them at some time taking a shower. It was the general practice; that is what I believe.

Q. When would they take the shower?

A. They would take it from about some time between 2:15 and 3:00 o'clock.

Q. How often did you see Mr. Fox take a shower between 2:15 and 3:00 o'clock?

A. I can't say how often I saw him, but I have in my mind a very distinct recollection of Mr. Fox coming out of the shower, because he was always dressed better than the others and I have seen his

(Testimony of Percy Glenside Dobson.)

hair slicked back wet and I just have that picture in my mind. I can't say how often.

Q. Who, if any one, was in his place in the mill during that time?

A. I can't say. I suppose the ball mill man was or the solution man, whichever case it was.

Q. Did you ever see Mr. Childers take a bath between 2:15 and 3:00 o'clock?

A. Yes, I have.

Q. How often?

A. I can't say. I have seen enough so that I would say it was [120] his general practice.

Q. Did you ever seen Mr. Morden take a bath between 2:15 and 3:00 o'clock?

A. Well, I haven't any recollection of him being up there, no I have not.

Q. Didn't their duties, of these three men I just mentioned, require their attention in the mill between two and three p. m.?

A. They could get away any time at the mill. One man could be away from the mill at any time, so it didn't.

(Question read)

Q. Can you answer that yes or no?

A. I said it didn't. The mill did not require their attention.

Q. It didn't require their attention?

A. No.

The Court: I would like to have that explained a little more. Could both leave?

(Testimony of Percy Glenside Dobson.)

A. No, I mean one man at a time, that is what I am driving at. In other words, the mill could be operated and go by itself if one man was just in attendance.

The Court: During the hours that they were supposed to be employed, were they supposed to be on duty during those hours at all times, unless some special reason called them away?

A. They were supposed to be on duty, yes.

Q. Did you ever speak to any of these men that you seen taking a shower between 2:15 and 3:00 p. m., to the effect that they should remain in the mill during that time?

A. As I said before, it was never my practice to talk to the men [121] themselves. I always took it up with the respective bosses.

Q. Did you speak to the respective bosses about this practice of the men taking a shower between two and three o'clock p. m.? A. I did.

Q. And what were the instructions that followed?

A. His explanation was that in his opinion it was all right if the men wanted to divide their lunch hour so that they took a shorter lunch period and had time to take a shower.

Q. Were their duties in the mill done for every hour during the eight-hour period?

A. You mean both men together or one man?

Q. Well, each man.

A. No, their duties weren't done. At least, the plant could operate itself.

(Testimony of Percy Glenside Dobson.)

Q. Then is it your contention that the company was employing one man more than it was necessary for them to employ?

A. Yes—one man what?

Q. Employed one more than necessary?

A. Yes.

Q. Why was that done?

A. Mainly for the reason that we didn't like to leave one man alone on an operation at night. A man might get caught in the equipment or get tangled up in some of the moving equipment and it would be very dangerous if a man was on a shift *along* at night and did get injured nobody knew anything about it.

Q. Couldn't a watchman have been employed for that purpose?

A. No, it is never the practice to employ watchmen for that purpose. [122]

Q. Couldn't a man be employed for less wages for that purpose?

Mr. Thatcher: Objected to as calling for speculation on the part of the witness.

The Court: Objection overruled.

(Question read)

A. Certainly he could be employed for less wages just to stand around and look.

Q. But that wasn't done? A. No.

Q. All of these men were employed because of their knowledge, experience, and ability to handle the work for which they were employed, is that true?

(Testimony of Percy Glenside Dobson.)

A. They have to have certain qualifications before we employ them, yes.

Q. Were there instructions given by the mill foreman or mill superintendent relative to whether or not they could take shower baths during the course of their eight-hour shift?

A. I don't know whether he gave those instructions or not.

Q. And were you interested enough to ascertain whether he did or not?

A. The function of the manager is to ask for results and if you get the results you want you leave a lot of that to the discretion of your subordinates.

Q. And isn't it a fact that the management did get satisfactory results in the operation of the mill?

A. As a result of the mill superintendent's and our consulting metallurgist's advice, we did.

Q. And was it not also from the men actually engaged in the [123] operation of the mill?

A. We found a lot of men there inefficient. I might say they were set in the ideas they got from other plants and wanted to run this plant the way other plants were run, so we had to let a lot go for that reason.

Q. How many men did you employ in the mill between the 2nd of January, 1940 and April, 1942?

A. I can't say.

Q. Can you give an approximate estimate?

A. I would say approximately 25—30 maybe.

(Testimony of Percy Glenside Dobson.)

Q. Were the services of Mr. Fox in the operation of the mill satisfactory during the entire period of his employment?

A. Mr. Fox was, as a rule, quite satisfactory.

Q. Was Mr. Childers? A. No.

Q. Was he discharged?

A. I believe he was, or it was put up to him that he just ought to leave.

Q. He was inched out, is that it?

A. That is right. In other words, if you tell a man his work is not satisfactory and if he can't do better he better leave, he says, "All right, I will leave." That is the situation.

The Court: We will take our recess now until 1:45 this afternoon.

(Recess taken at 12:00 o'clock) [124]

Thursday, October 23, 1942

Afternoon Session

1:45 P. M.

MR. DOBSON

resumed the witness stand on further cross-examination by Mr. Scanlan.

Q. Was that how your notice that he was to leave was given there?

A. It wasn't my personal notice, no. That is what I understand took place between the mill superintendent and Mr. Childers.

(Testimony of Percy Glenside Dobson.)

Q. Do you know how long Mr. Childers worked there? A. Yes, he worked there over a year.

Q. And in what way was his work not satisfactory?

A. As I said before, he wouldn't follow instructions and he wanted to run the mill the way it had been run at other places where mills had been run where he came from and he neglected a lot of his duties.

Q. He was discharged, was he, soon after this committee meeting which you testified to?

A. I don't think soon after. I can't say exactly how long after. It had nothing to do with it, if that is what you mean.

Q. Now besides the two men on each shift, what other men were employed in the mill?

A. There was a mechanic and a helper and then the assayer helper used to work in crushing and depending upon the work he had to do. There were generally two other men beside Mr. Clawson.

Q. Didn't some of these men who worked as operating ball mill men and solution men also sometimes work on repair work or something of that nature?

A. I believe they did when the mill was closed down. For instance, if the ball mill was being repaired and the mill was [125] down, they probably would be occupied in that.

Q. Sutton was employed mostly on day work, wasn't he?

(Testimony of Percy Glenside Dobson.)

A. I don't think he worked day shift any more than the others. I think he was on swing shift.

Q. Hutchins worked a good deal on day shift, didn't he?

A. Hutchins, we took him off mill solution work and put him on another type of work, entirely different.

Q. Was that all day shift?

A. That was all day shift, and Mr. Hutchins looked after the mill if Mr. Clawson was sick some time.

Q. Mr. Fox also worked on day shift quite a good deal, did he not?

A. I would say one-third of his time was on day shift, for the reason he was relieving each day and the men changed shifts regularly.

Q. Childers also worked on the day shift some of the time, that is, repair work?

A. I do not believe Mr. Childers did much repair work.

Q. And those men who were working on repairs, running the ball mill, and things like that, they had an hour for lunch, did they not?

A. Yes.

Q. Isn't it possible that sometimes when you saw these men taking the time that they did, that they were entitled to an hour for lunch?

A. They were always entitled to an hour for lunch.

Q. Was there any distinction in the lunch period between the men who were working as operators

(Testimony of Percy Glenside Dobson.)

of the mill and those who were [126] working on repair work? A. Yes.

Q. What was it?

A. Those men often took their lunch period when it was convenient.

Q. Which men do you mean?

A. I mean the men on repair work.

Q. They took a definite period of time, did they not, like an hour, between twelve and one, or something like that? A. Yes.

Q. And they would sit down and eat their lunch, would they not? A. That is right.

Q. And when you saw some of these men taking a half hour or three-quarters of an hour for their lunch, wasn't it probable that they were working on repairs at that time?

A. On maybe two or three occasions, but not as a general rule.

Q. But on some of these occasions as to which you testified?

A. It might be possible on two or three of the occasions.

Q. Now if the services of one of the men on the operating shift was not essential between two and three o'clock, why didn't you let him discontinue his work at two o'clock and go home?

A. He couldn't get home; there was no bus to take him home.

Q. If he arranged to use his own car he could have worked that way, could he not?

(Testimony of Percy Glenside Dobson.)

A. Well, you understand we didn't have the bus there for the first few months. They came in their own car. If he went home and left one man in the mill, the other had to walk.

Q. The other man could provide a car if he wanted to? [127]

A. Yes, he could if he wanted to, I suppose.

Q. At any rate, the man wasn't permitted to leave the mill and go home at two o'clock or 2:15, when he was on day shift?

A. He had a stated time to work.

Q. What time was that period of time?

A. His shift was seven hours starting and then a shorter period.

Q. And what hours was that for the day shift?

A. That would be from seven till lunch and then take an hour for lunch and then work until three in the afternoon.

Q. And oftentimes a man would go to the change room and take a shower at 2:15 o'clock, that is your testimony? A: That is right.

Q. So really some of the men were taking two hours out of the eight every day, were they not?

A. No; as I explained before, the men were more or less—when they came to work for us they were told that they had seven hours to work and they had an hour off and we more or less left it up to them if they wanted to take that hour all together or if they wanted to take a bath part of that time or if they wanted to go and walk around the plant the rest of the time.

(Testimony of Percy Glenside Dobson.)

Q. And is it your testimony the men could take a half hour for lunch period and half hour for taking a shower? A. Yes.

Q. Or he could take off an hour any other part of the day, is that your testimony?

A. We allowed him to do that, yes. In other words, they had [128] seven hours to put in work and if they wanted to spend their hour taking a shower or eating, it was up to them. We had no jurisdiction over that.

Q. Did you ever fix definitely the time that they were to take this hour?

A. We left it up to them at first, but at a later time we didn't.

Q. And a man could come to work at 7:30 in the morning if he desired and take a half hour for lunch?

A. No, because he had to relieve that man that was going off.

Q. Well, did the man going off have to wait until his relief came?

A. He had to see him when he went off, that was the common practice.

Q. So that consequently the man had to be there at the end of the shift, did he not?

A. Yes, we expected him to be there at the end of the shift.

Q. And he couldn't be off the shift?

A. He could be off before the end of the shift.

Q. And then come back and wait for his man to relieve him? A. Yes.

(Testimony of Percy Glenside Dobson.)

Q. Is that the way the mill operated all the time?

A. As I say, we left the hour up to those men that were working. They were working seven hours and they had that one extra hour and it was up to them to do what they wanted to do.

Q. Is it your testimony that none of these plaintiffs in this case worked more than seven hours a day?

A. It is emphatically.

Q. And you know that of your own knowledge?

[129]

A. Wait a minute—I will restate that.

The Court: Read the question.

(Question read)

A. I have not watched them for the whole period, I never was there, but I have never seen them work more than that. As I say, I was only there on day shifts and once or twice a week.

Q. So consequently you do not know of your own knowledge that a man took a shower every day?

A. No, I do not.

Q. Or whether he took half an hour for lunch every day?

A. No, but I know the general practice.

Q. Don't you know of the general practice that a man was on shift in the mill, on day shift, between 7:00 a.m. and 3:00 p.m.?

A. No, I stated in that notice he had that hour off.

Mr. Scanlan: Read the question.

(Question read)

(Testimony of Percy Glenside Dobson.)

A. No, he was not.

Q. Not at all?

A. Not to my knowledge, and he wasn't supposed to be. It was most——

Q. Would you say of your own knowledge that he was not in the mill for eight hours every day?

A. Every day he worked you mean?

Q. Yes. A. Well, I can't say that, no.

Q. And as to the afternoon shift, would you say of your own knowledge that he was not in the mill from 3:00 P. M. until 11:00 P. M.? [130]

A. I don't know about the afternoon shift. I just know the general practice established.

Q. And you don't know either as to the general practice a mill man might have on shift in the mill between 11:00 P. M. and 7:00 A. M.?

A. I don't know from my own knowledge what was going on, but I know the practice that was established.

Q. Are you able to testify as to whether or not these rules which you had stuck up in the mill were generally observed?

A. The rule of working seven hours and taking an hour off was the general practice.

Q. That was the rule, but was the rule observed?

A. I would say, considering the time they took for a shower, yes.

Q. Well, was there anything in the rules regarding taking showers?

A. No, there was a rule for the time they worked, the number of hours.

(Testimony of Percy Glenside Dobson.)

Q. Did any of these plaintiffs receive wages for eight hours pay—— A. They would have.

The Court: Wait a minute.

Q. (Continuing) ——during the time which they claim they worked?

A. They got paid for everything that they put on the time card. If they didn't work eight hours and didn't put it on the time card, they weren't paid it.

Q. And if they put on seven hours, they were paid for seven? A. That is right. [131]

Q. If they put on nine hours, they were paid for nine? A. Yes.

Q. Did any ever put on nine hours?

A. If they worked overtime, yes.

Q. But you don't know whether they did or not?

A. I know some of them worked overtime, yes.

Mr. Scanlan: That is all.

Re-Direct Examination

By Mr. Thatcher:

Q. Mr. Dobson, how many times has the mill been down, that is, shut down, since January 2, 1940 through April, 1942?

A. Just what do you mean by shut down? Do you mean on account of power or do you mean having——

Q. Mr. Scanlan spoke of the fact that there were times when the mill shut down, the mechanics of the mill.

A. We shut down on two or three occasions to

(Testimony of Percy Glenside Dobson.)

clean out some of the tanks and that took a day or so at a time to do that.

Q. Would you be able to say how many times during that period from January 2, 1940 to April, 1942?

A. I wouldn't say with any certainty, but it would be my opinion probably two or three times.

Q. I believe you testified on cross-examination, Mr. Dobson, that one man could run that mill?

A. Yes, he could.

Q. Did you ever have any conversation with your superiors or with Mr. Clawson, the mill superintendent, in respect to employing one man on the mill, rather than two?

A. Well, it was always Mr. Clawson's contention that one man could run the plant, but as I said before, I felt, and our consulting engineer, Mr. Jarolemon felt that for the reasons I stated, accidents, and so one man could relieve the other, he thought it was safest for two men to be on the job.

Q. Your testimony is that your reason for employing two men is that one man would be required for relieving the other on the job?

A. Yes, and for the safety factor too, not having one man get tangled up in the equipment.

Mr. Thatcher: That is all, Mr. Dobson.

Re-Cross Examination

By Mr. Scanlan:

Q. There were always several men on day shift, were there not? A. Yes, sir.

(Testimony of Percy Glenside Dobson.)

Q. Was Mr. Clawson or any other man around there in the afternoon on day shift?

A. Inasmuch as Mr. Clawson moved out to the property, lived on the property after it was in operation a few months, I presume he dropped in there and looked at the thing to see if it was going on the afternoon shift, or possibly, as he did the repairs, if he had repair work to do, he would be working there himself some of the time.

Q. When did he move out on the property?

A. I believe it was October, I am not certain about that, of 1940.

Q. How long did he continue to live there?

A. He is living there now.

Q. How far from the mill is his home?

A. Oh, approximately 600 feet.

Q. Was there any connection, like telephone, between the mill——

A. No, there is no telephone. [133]

Q. ——and his place there? A. No.

Q. Were there any bells or signals?

A. No.

Q. They could have been installed though, could they not?

A. If there was a necessity for them.

Q. Such as, for instance, calling him instead of keeping another man on shift when his services were not necessary?

A. What do you mean by that—one man instead of two?

Q. Yes.

(Testimony of Percy Glenside Dobson.)

A. Well, as I said, it could have been done and it was Mr. Clawson's contention that it should have been done but we then didn't change the policy, but did go back to that later so at present Mr. Clawson has his way and we are operating that plant with one man on shift.

Q. But these two men on each shift were always available on company property, were they not?

A. Except for the lunch period.

Q. Well, were they not always on the property?

A. I presume if they wanted to stay they could. We didn't chase them off the property.

Q. There was no objection, if one man needed the assistance of the other man, the other could be called at any time, could he not?

A. He could, and then he should have put on his card that he worked overtime.

Q. There was never at any time that any of the operating men went away from the property between the time that they went on shift and the time that the shift ended after a period of eight [134] hours?

A. I don't know where they would go. They would have to walk quite a ways to get off the property.

Mr. Scanlan: That is all.

MR. CLAWSON,

a witness on behalf of the defendant, being first sworn, testified as follows:

Direct Examination

By Mr. Thatcher:

Q. Will you state your name?

A. Raymond L. Clawson.

Q. Where do you reside, Mr. Clawson?

A. I reside at the Summit King Mines.

Q. That is near Fallon?

A. Thirty-one miles east of Fallon.

Q. By whom are you employed?

A. By the Summit King Mines, Limited.

Q. How long have you been employed there?

A. Since December, 1939, the first part of December.

Q. Have you been employed at the mill on the property?

A. Continuously since the mill went in operation.

Q. In what capacity?

A. Well, for the first few months I was a master mechanic and after the first few days in May, in 1940, I have been mill superintendent of Summit King Mines mill.

Q. Have all of these plaintiffs in this action been employed by the defendant during a certain portion of the period at least that you were mill superintendent? A. Yes.

Q. You are familiar with them all? [135]

A. Yes.

Q. Will you explain to the court just what the mechanical setup of this mill is?

(Testimony of Raymond L. Clawson.)

A. I might ask the attorney, you mean the general operation of the mill?

Q. Yes, just what the operation is.

A. Well, we have a five by six Marcy ball mill. You mean through the operation?

Q. Yes.

A. And a Dorr duplex classifier, one Dorr primary thickener, three Dorr agitators, one 5-tray Door washing thickener, and Merrill-Crowe precipitation system and two Cummings Diesel engines. Only one of them operates at a time though. That is the major operation of the mill.

Q. What happens to the ore from the time it leaves the bin as it goes through the mill?

A. It is ground by the ball mill classifier, through the classifier and settles in the primary thickener. From there it goes to the agitator and agitated and from there it is pumped up to the washing thickener, washed, and when it leaves the last thickener it is run by gravity into the tailings waste.

Q. Two men are employed on each shift in this mill?

A. They were, but not at the present time.

Q. They were at all times mentioned in this complaint? A. Yes.

Q. And that was during three shifts a day?

A. Yes, for twenty-four hours, two men on a shift.

Q. What are the duties of a ball mill man? [136]

A. A ball mill man has to oversee the general operation of the ball mill, check his densities of

(Testimony of Raymond L. Clawson.)

both classifier and ball mill, take the weights of his incoming ore and add any lime or cyanide that might be necessary, to keep the solutions up to the proper strength.

Q. Are those all of his duties during the day?

A. No, at a later date I had the ball mill man do a portion of the greasing.

Q. What experience have you had in the operation of mills?

A. Well, I will have to think back when I started—you might say the big portion of my working life. In 1914 I started working in the mill—1912.

Q. And you have worked in mills continuously?

A. Not continuously, but the major part of the time.

Q. And you are familiar with their operation?

A. I am.

Q. And with the duties to be performed by men working in them? A. Yes, sir.

Q. Could you tell the court how much time would be consumed by the ball mill man in the performance of all of these duties of which you just spoke throughout a shift?

A. Not over 50 per cent of his time.

Q. And how would the balance of his time be spent?

A. Well, that would be up to the ball mill man. That is, in this particular mill it would take not over 50 per cent. Some mills it is different. We only have one ball mill for a man to operate, whereas

(Testimony of Raymond L. Clawson.)

I was foreman in one mill where one man operated six mills and six classifiers. [137]

Q. There is only one ball mill in this particular mill? A. Yes.

Q. Is this mill a second-hand mill or built new?

A. It is absolutely a new mill.

Q. Is it regarded as an efficient operation or otherwise?

A. According to the mining men that visit it and in our own opinion, it is very efficient.

Q. Would you say that it required more or less attention than other mills of comparable size?

A. Less attention than most mills.

Q. Did the ball mill in charge of the ball mill man require a great deal of watching?

A. I will say at times yes. We have a changeable ore there at times. They did have to change the mill.

Q. About how often would that occur?

A. Well, I would say their major changes might be twice in an hour.

Q. About how much time would that consume?

A. Making the change—I would say 10 minutes.

Q. Was the ball mill man required to make any entries on paper, written, of his duties as he performed them? A. Yes, sir, every hour.

Q. And were entries made every hour?

A. I can't say positively that they came on every hour, although they showed every hour.

Q. How much time would be consumed by a ball

(Testimony of Raymond L. Clawson.)

mill man in gathering the data necessary to make the entry?

A. Well, I timed the present operator there when he come on and [138] he done it in exactly ten minutes. Now that has been done several times.

Q. So that if entries were made every hour, no more than ten minutes was consumed?

A. That included taking the densities.

Q. So that no more than ten minutes of each hour would be consumed in getting the data to make the entries?

A. To make one entry.

Q. Your testimony is no more than 50 per cent of the time of the ball mill man would be consumed in actual labor?

A. When I say 50 per cent, I am giving him lots of leeway.

Q. But 50 per cent would be the maximum amount of time spent?

A. Yes, sir.

Q. What, in general, were the duties of the solution man, Mr. Clawson?

A. Well, in general the solution man was made responsible for the operation of the mill in general, and also to see that the solutions were kept up to the proper strength, cyanide, lime, and the balance of the solutions throughout the mill, the pulp.

Q. What were his duties specifically?

A. Well, to take the titrations, take the densities, put the zinc on the belt, oversee the mill in general throughout; also the solution man's duties was to—

(Testimony of Raymond L. Clawson.)

not to start with, only on the grave yard shift—to fill the oil tank, and at a later date I had every solution man coming on shift to fill the fuel tank on the Diesel.

Q. How much time would you say the solution man spent during the eight-hour shift performing all of these manual duties re- [139] quired of him?

A. Not over 50 per cent of his time.

Q. What would be required of him the balance of his time on shift?

A. Well, I would say that all depended on the solution man. In the practice of running a mill, if you get your solutions balanced, there are times that you can have any length of time. You might not make an adjustment for several hours.

Q. It is perfectly possible then for this——

A. And other times you had to do it oftener.

Q. It is perfectly possible then for this mill to run an hour or more without any service of any nature being required by the solution man?

A. I would say yes, it could.

Q. Would that be very often?

A. Well, now that depends a great deal upon the efficiency of the operator and how well he can keep his ball mill man keeping his feed steady. A great deal depends on the ball mill man, whoever is operating the ball mill, how the balance of the mill operates. If he is erratic, the mill is erratic all the way through.

Q. You heard Mr. Fox's testimony, did you, Mr. Clawson?

A. Yes, sir.

(Testimony of Raymond L. Clawson.)

Q. You heard his testimony to the effect he had to keep his mind constantly upon the operation of the mill? A. Yes.

Q. Do you think that testimony is accurate in every respect?

A. I can't say that it is because I have operated before I [140] took charge of mills and I can't say my mind was always on it and I was considered a very good operator, which I must have been because I went from a practical man that I have been in charge of five different mills.

Q. Is it possible for one man to operate the mill alone without any assistance from the other?

A. Very easily.

Q. You heard Mr. Fox's testimony also, Mr. Clawson, to the effect that all the men working on the ball mill were green hands and he did not feel justified in turning the mill over to them?

A. Yes sir, I did.

Q. Were these men with whom Mr. Fox worked green hands?

A. The majority of them had the same years of experience in mills as Mr. Fox.

Q. What particular man among these men Mr. Fox worked with was green?

A. Well, the men in the complaint there Mr. Fox worked with, John Jones.

Q. Was he a green man?

A. He was absolutely a green man.

Q. Any other man?

(Testimony of Raymond L. Clawson.)

A. Mr. Dustin hadn't a great deal of experience. His recommendations showed that he had operated a ball mill at the Black Mammoth off and on before he went in there as a ball mill man. Now it is possible—we tried to get men that at least had ball mill experience, but most of our men had several years of experience.

A. As respects a green man, what was your custom when you put a [141] green man on a job?

A. My records show when we had a green man there, we tried to keep one of these men overtime to show him until he was familiar with the major duties of his job.

Q. How long did a man, after he was employed, remain a green man at the job?

A. Well, as a helper a man in that mill can take care, if he is at all intelligent, can take care of his duties after one to two days, with the proper overseeing, of course.

Q. Are the duties such as to require any particular technical knowledge or scientific knowledge?

A. No sir.

Q. Are they duties that are easily learned?

A. Very very easily learned.

Q. Would you say after a man had been at the mill, worked for a month, he would be a fairly experienced man?

A. Well, there is always in milling room for improvement. It don't make any difference how many years you may work in it, but he can operate his shift, yes.

(Testimony of Raymond L. Clawson.)

Q. During the period you were superintendent of the mill, would you say that any one of the solution men would have been justified in turning over the mill to the ball mill man while time was taken out for lunch?

A. Temporarily, yes. I have left a mill alone and in all my time never had a wreck any worse than I found in the mill with two men, and left the mill absolutely alone.

Q. Would you feel these ball mill men were perfectly capable of taking care of the mill during the lunch hour? [142]

A. Yes, I would, after one or two days.

Q. And you, yourself, would feel no hesitancy in leaving them in charge for a short period of time?

A. No, I would not; I have done it.

Q. Would that also be true of the ball mill man taking time for lunch and leaving the solution man in charge? A. Yes sir.

Q. Were the services of two men required at all times in the mill during each and every hour of the day?

A. No. In my opinion they never have been required. I would like to change that. I mean that the operations never, in my opinion, it was never necessary to have two operators.

Q. What was the purpose of having two operators at the Summit King Mines mill?

A. Well, when I took charge of the mill I wanted to change to one man. Mr. Dobson said he had taken it up before and didn't want to do

(Testimony of Raymond L. Clawson.)

it for the simple reason they were out there some distance away and to start with I wasn't even living at the mine when I first took charge, and we decided for safety's sake, as well as relieving one another, that we would operate with two men.

Q. So the two men was a matter of practice in this particular mill?

A. It was up until recent months.

Q. You stated you are familiar with all of the plaintiffs here in the action? A. Yes, sir.

Q. You know Mr. Fox, do you? [143]

A. I do.

Q. Was Mr. Fox regarded by you as an efficient workman?

Mr. Scanlan: Objected to. It is one man's opinion of another man's capacity and experience. It is calling for his opinion.

The Court: Well, I think he may be qualified to express an opinion. I will permit it, subject to the objection.

(Question read)

A. Yes sir.

Q. You had no complaint to make of Mr. Fox's performance of his duties?

A. No, I can't say I did up to the last day of our association.

Q. Were you around the mill a good deal during the day shift?

A. Well, yes. I had other duties beside the mill, but my greatest part of the time in the day time was around the mill.

(Testimony of Raymond L. Clawson.)

Q. About how much time did you spend in the mill?

A. Oh, I would say after—well, from the first two weeks it started I never left the mill. I even slept in the mill.

Q. I mean after you became superintendent.

A. If I were on the job; that is, at the mine, I usually put in generally from eight to ten hours around the plant.

Q. That is all three shifts?

A. Yes, I have been, but my general practice was to put my time in on the day shift, but I have been in the mill and made inspections when things weren't just right other shifts quite frequently.

Q. How many times during the day shift did you give instruc- [144] tions to the men on shift to make changes or do other things around the mill?

A. Well, that is pretty hard to give any definite amount. If it was needed, I might do it several times in a day and there might be days I never had to do anything about any instructions.

Q. About how long were you in the mill during the afternoon shift?

A. Oh, that varied. I would say that I was always there over an hour after they come on shift, but usually a greater length of time than that.

Q. Were you there at all times during the afternoon shift, all hours?

A. Well, yes, at different times. I went in at all hours.

(Testimony of Raymond L. Clawson.)

Q. And how about the grave yard shift?

A. Some on the grave yard shift but not so frequently as the afternoon because it interfered with my rest, but I have been out at the house—you know on all shifts, which was almost necessary with a man operating without a shifter.

Q. Do you know what Mr. Fox's practice was in eating lunch?

A. His practice generally was that he ate lunch either outside the little office or inside on the bench I used for my records.

Q. Do you know how much time he consumed in eating lunch?

A. I couldn't say positively how much time he used.

Q. Did he eat his lunch the same hour every day?

A. No, I wouldn't say he did.

Q. There wasn't any set time for him to eat his lunch?

A. There was no set time.

Q. Did Mr. Fox ever take any other periods off during the shift [145] that you recall?

A. I will say Mr. Fox didn't take as much time off as a rule as some of the other men. Most of the time the ball mill man and the solution man would eat in the office together.

Q. After the eating period, did Mr. Fox ever take any time off?

A. Yes, he has. The fact is, I have been in there working on my records and they have stayed in there, especially in cold weather when it was

(Testimony of Raymond L. Clawson.)

the only place that was really comfortable to sit around.

Q. I mean has he ever at times outside of noon taken any time off? A. I would say yes.

Q. You would ask him what he was doing during those periods? A. No, I have not.

Q. If he was just sitting around, you said nothing to him?

A. I did not. Pardon me, I would like to change that answer. If I saw something that needed attention, yes, I would speak to him, but otherwise I wouldn't bother him. I don't think any of the men can say I bothered them when I found them sitting down.

Q. Do you know Mr. Gilbreth, one of the other plaintiffs in this action? A. I do.

Q. What were his duties in the mill?

A. To start he was ball mill man and at a later date, when Mr. Sutton left, he was advanced to solution man, which is the general practice in there, regardless of their experience. The men, if they are capable of handling solution, they were advanced according to their seniority. [146]

Q. What was Mr. Gilbreth's practice in regard to lunch periods? A. To eat in the office.

Q. Do you know how much time he consumed?

A. A great deal at times.

Q. About how long would that be?

A. I have known him sometimes to take an hour and a half. The fact is I had to speak to him

(Testimony of Raymond L. Clawson.)

several times about reading his magazines when he should be on the job.

Q. After Mr. Gilbreth had eaten his lunch, did you ever find him sitting around the mill doing no work?

A. Yes sir, I have, reading his magazine.

Q. Did you ever speak to him about what he was doing?

A. I have at times and one time he told me that that was part of his time off but it was past the noon hour and he still continued to read afterwards.

Q. Well, did it happen very often when a man was questioned while sitting and reading that he said it was part of his time off for the noon hour?

A. Yes, that was the thing they did tell me.

Q. If they told you that, did you ever ask them to perform any duties in the mill?

A. Yes sir, if there was something wrong, I called their attention to it.

Q. But if a man told you that this was part of his lunch period, you considered he wasn't under your supervision?

A. I did, unless I knew positively he had taken a great deal more time than he should have.

Q. Do you know Mr. Sutton? [147]

A. Yes sir.

Q. What was Mr. Sutton's practice in regard to lunch?

A. Mr. Sutton's practice in regard to lunch, Mr. Sutton was a very very attentive man to his mill. The fact is, the man seldom spoke. He didn't trust

(Testimony of Raymond L. Clawson.)

practically anybody to do his work. I think that included Mr. Fox as well as the other helpers.

Q. What was his practice with regard to lunch?

A. Well, his practice was to eat his lunch on the steps leading from the primary thickener floor or office floor up to the agitators, that was his general rule. Sometimes he did eat in the little office.

Q. About how long did he consume as a lunch period?

A. I would say he took anywhere from 15 to 20 minutes.

Q. And what did he do at the end of his lunch period?

A. As a rule Mr. Sutton always got up and began to move around. What he done absolutely I couldn't say because——

Q. Do you know Mr. Jones?

A. Yes, I do. I hired Mr. Jones.

Q. When you hired Mr. Jones did you inform him in regard to alternating lunch hours at the mill?

A. I certainly did.

Q. Is that true with respect to Mr. Hutchins also? A. Which Mr. Hutchins?

Q. Orville Hutchins?

A. No, Orville Hutchins was hired by Mr. Sage or Mr. Dobson, I wouldn't say which. They were in operation when I took charge of the mill.

Q. Is that true with respect to Mr. Sutton? [148]

A. He was hired by the former superintendent or management.

(Testimony of Raymond L. Clawson.)

Q. And Mr. Gilbreth?

A. I hired Mr. Gilbreth personally.

Q. Was Mr. Gilbreth instructed to alternate his lunch hour?

A. He was and told to work seven hours and alternate. He was working at the time for the Penelas mine and they worked eight hours. How they worked it, I don't know, but I told him that we were only supposed to work seven hours and alternate.

Q. What was Mr. Jones' practice in regard to lunch?

A. Mr. Jones' practice was to stay as much time as possible in the office all through the shift.

Q. About how much time did he consume eating his lunch?

A. Well, until I run him out, he had as high as an hour and a half in the office.

Q. That was what he claimed to be the lunch period?

A. Yes, but I happened to have my watch on him because I was there.

Q. What was the practice of Mr. Hutchins, Orville Hutchins?

A. Orville Hutchins' practice was that he visited around and especially in the assay office with Mr. Jones, the assayer. He also carried it so far that we had to call his attention to it.

Q. About how much time did he spend at lunch?

A. From the time he started to eat until he went back to work was often well over an hour.

(Testimony of Raymond L. Clawson.)

Q. Mr. Hutchins left the mill then and went to the assay office?

A. He went to the assay office, went to the main hoist house, also the change room. In other words, he was quite a visitor. [149]

Q. Did you find Mr. Jones' work satisfactory?

A. I can't say that it was too satisfactory, no; so much that he didn't get the promotion and that is the reason he quit.

Q. Did you find Mr. Hutchins' work satisfactory? A. Mr. Orville Hutchins?

Q. Yes.

A. For quite a period, yes, but afterward he got so careless, that is the reason I let him go.

Q. Was Mr. Gilbreth's work satisfactory?

A. Sometimes, yes.

Q. It was not continuously so?

A. No, as I said, he spent too much time reading magazines in the office.

Q. Were there a number of magazines in the mill itself?

A. Yes, sir. When the mill was cleaned up behind my desk we counted 27 magazines and I took them out and destroyed them and in a very few days there were several back there again.

Q. Do you know Mr. Dustin? A. Yes, sir.

Q. What was Mr. Dustin's practice in regard to lunch?

A. His practice was to take his time off in the office or up at the assay office where he had been

(Testimony of Raymond L. Clawson.)

a helper. He often spent quite a lot of time in the assay office with Mr. Jones. He had been Mr. Jones' helper for six or seven months.

Q. And Merrill C. Hutchins, what was his practice?

A. Merrill C. Hutchins, I can't say I ever saw him out of the mill when he took his noon hour off. He sat around. The time was to be taken when most convenient for them; it was left up to [150] them.

Q. How long did Mr. Hutchins consume eating lunch?

A. I would say actually eating his lunch probably 15 to 20 minutes.

Q. Did he sit around after finishing his lunch?

A. He used to, yes.

Q. How long after?

A. Fifteen or 20 minutes sometimes; sometimes more.

Q. Did Mr. Merrill C. Hutchins ever read on the job?

A. Yes, he did.

Q. For long periods?

A. Well, at times for quite a period, especially at night time.

Q. When he was found reading, did he also claim it was part of his lunch hour?

A. One particular time, yes. I asked him how much time he consumed reading his magazines instead of operating his mill. He said he did it on his lunch hour.

(Testimony of Raymond L. Clawson.)

Q. Was Mr. Merrill C. Hutchins a satisfactory employee?

A. Up to a certain period, when I had to let all my mill crew go but Mr. Fox, for neglecting their duties.

Q. You are acquainted with Mr. Childers, are you? A. I am; I hired Mr. Childers.

Q. What was Mr. Childers' practice in regard to lunch?

A. About the same as the rest of the men. Ate his lunch most always in the office.

Q. About how long a time did he take?

A. I would say from 15 to 20 minutes, and sometimes more.

Q. After he finished eating, what did he do then?

[151]

A. Sat around mostly.

Q. In the office?

A. As a rule it was outside of the office.

Q. About how long did he sit around?

A. Well, at the lunch hour, like I say, the most of them tried to consume the big end of their lunch hour by sitting down and taking their own time, mostly in the mill.

Q. Did Mr. Childers ever do any reading on the job? A. Most certainly.

Q. You have heard his testimony, have you not?

A. I did.

Q. Testimony to the effect that he read only scientific periodicals?

(Testimony of Raymond L. Clawson.)

A. Yes, but I have seen Mr. Childers bring his newspaper out there, not once but many times.

Q. Did he read that newspaper during shift?

A. I have seen him reading on shift. That wasn't on day shift, that was on afternoon shift.

Q. Did you ever speak to him about that?

A. I can't say I ever did.

Q. Did you tell Mr. Childers when he was first hired that he was expected to alternate his lunch hour with the other man on the shift?

A. I did. When I hired Mr. Childers I talked about Nivloc where he came from and asked him about the practice there. I went to his house and hired him and told him what our practice was and he said he would be glad to take the job.

Q. Do you know Mr. Morden? [152]

A. I do.

Q. What was Mr. Morden's practice in regard to the lunch hour?

A. Most of the time Mr. Morden worked for the Summit King but he worked for me probably six weeks. Mr. Morden's practice was, as near as I can say, as near as he said, which was that he usually ate right there on the steps or little platform by the ball mill and Mr. Morden took, I would say, 15 to 20 minutes for his meals.

Q. Do you know what he did with his time after that?

A. No, I can't say he did or did not take it, but I will say this, that Mr. Morden and Mr. Sutton, who were partners during Mr. Norden's period of

(Testimony of Raymond L. Clawson.)

employment with the Summit King, they were very attentive to the mill.

Q. Is that also true of Mr. Childers?

A. I can't say that for Mr. Childers. He was neglectful.

Q. How about Mr. O'Neill, are you acquainted with him? A. I am.

Q. What was his practice in regard to the lunch period?

A. Mr. O'Neill's practice was to take a very long lunch hour.

Q. About how long?

A. Especially on night shift.

Q. How long would you say?

A. At one time he took two hours and a half. It was on the 29th day of November, 1940, the day before I was in the automobile wreck.

Q. At other times about how long would he take?

A. I would say he consumed his hour.

Q. His *our* all the time? [153]

A. Yes, sir. Usually he was in the mill though.

Q. Was Mr. O'Neill a satisfactory employee?

A. No, I can't say he was.

Q. Do you know Philip E. Ferris?

A. I do; I hired Mr. Ferris.

Q. Was Mr. Ferris ever told about the practice of alternating lunch hours?

A. He was. When I gave him the job. He went there temporarily and it turned out he worked there for two different periods.

Q. What was his practice in regard to lunch?

(Testimony of Raymond L. Clawson.)

A. He took his lunch and ate in the office away from the ball mill.

Q. About how long a time did he spend?

A. I would say he consumed anywhere from 15 minutes to 20 or 25 minutes to eat his meals, about like an average man does eat his lunch.

Q. What would he do with his time after he finished his meal?

A. Usually sat around there, around the office.

Q. About how long would he sit around there?

A. I would say anywhere from 30 minutes, around 30 minutes.

Q. Was Mr. Ferris a satisfactory employee?

A. He was quite satisfactory.

Q. Did these men use the change house?

A. Well, I would say all of the men did to my knowledge use the change house, excepting I couldn't say about Mr. Morden and Mr. Sutton and after I took the operation over, Mr. Fox always changed in the mill, so far as my knowledge.

Q. The balance of the men though used the change house? [154]

A. At times. Not all the time, but for quite a period when I first went there.

Q. Did they use this change house at the beginning or end of the shift? A. Both.

Q. How long before the end of the shift would they go to the change house?

A. I would say in the neighborhood of 45 minutes some, not all, because they tried to get there and take a bath. It was quite crowded when we were

(Testimony of Raymond L. Clawson.)

working a full crew in the mine and they tried to get up there and change before the miners came out of the mine and they usually would go up about 20 minutes, from 2:30 to quarter to three they would usually come out of the mine and at one time we had better than thirty men on each shift of the mine, running two shifts.

A. You heard the testimony of Mr. Fox and Mr. Childers that this mill required their constant undivided attention for a full eight hours of the day? A. Yes, sir.

Q. Is that also your opinion?

A. No, it is not.

Q. Could these men, any one of them, have taken a full hour off any time they so desired, for the purpose of eating their lunch? A. Yes.

Q. If there were two men on shift, could one man take an hour off and have gone outside the mill for lunch if he so desired?

A. He could have, and some did do it and nothing was said. [155]

Q. It would not have interfered with the operation of the mill as long as there was one man on duty? A. It should not.

Q. Was it the practice of all these men to fill out time cards themselves? A. It was.

Q. Did you, after you became superintendent, initial the cards?

A. I did. I approved of all time cards that went to the office. The men were paid at the office on my OK of the time card.

(Testimony of Raymond L. Clawson.)

Q. Do you recall any time any one of these men ever claimed overtime for working during the lunch period?

A. No, I can't say that they did.

Q. What was the lunch period prior to April 23, 1941? A. One hour.

Q. And after April 23, 1941?

A. They were supposed to have 11 minutes—the solution man was supposed to be short 11 minutes of the hour and ball mill man 12 minutes.

Q. That is, the solution was paid——

A. Seven hours and 11 minutes. Eleven minutes was paid at the rate of time and a half for overtime.

Q. And the ball man?

A. Seven hours and 12 minutes for overtime.

Q. And the lunch hour was correspondingly reduced to 48 and 49 minutes?

A. It was supposed to be, but nothing was ever said, whether they should take full hour or just the 49 minutes. I will take that back. It was posted that way, but I didn't enforce it. [156]

Q. What was your reason for enforcing it, Mr. Clawson?

A. Well, as I said before, I operated a mill as an operator for several years and the main thing with myself, I found it was a lot nicer when the boss didn't specify just how and why I had to do each and every thing and I left it up to the men a great deal for that reason. Men that work three shifts it is bad enough at any time under the best con-

(Testimony of Raymond L. Clawson.)

ditions, where they have to alternate, half the time day shift, part of the time afternoon shift, and part of the time grave yard shift.

Q. Did these men eat lunch at any particular hour?

A. No, that was up to their own convenience. I had one man that sometimes started eating before he ever had his clothes changed. He said he had stomach trouble, and especially on afternoon shift, and even in the day shift, he would often eat ahead of time.

Q. If a man consumed only 20 minutes for lunch and then later sat down for 40 minutes more and told you it was his lunch hour, did you consider that he was entitled to take that time out?

A. I certainly would.

Q. And is that often the practice in a mill?

A. In this particular mill, yes.

Q. Were there many occasions when you found the men sitting down after eating hours or after they finished their lunch?

A. Yes, I have.

Q. Did you consider they were entitled to that time? A. I did.

Q. Did you ever attempt to give those men any supervision during that period? [157]

A. I can say yes, I had given them supervision at times. As far as I know, the man would have to tell me that was his lunch period and any time they did tell me that was their lunch period, I didn't bother them.

(Testimony of Raymond L. Clawson.)

Q. But if they told you that was their lunch period they were subject to no supervision?

A. I never bothered them when they told me that. I said there is nothing in a mill I can't do myself and I think the men will admit that. If necessary I would even change pumps for them when they were eating and haven't notified them I done such a thing.

Q. Is the mill at Summit King Mines operating now? A. Yes.

Q. How many shifts is it working?

A. Running three shifts with a shortage of manpower, sometimes milling ten hours, sometimes sixteen hours.

Q. How many men are employed for each shift?

A. One shift there is two men, on the other two shifts one man. I have only four men left in the mill. I lost some boys to the Navy and never replaced them. I am operating with one man on grave yard and one man on day shift. Next Sunday there will be two men on day shift and one man each on grave yard and afternoon shift.

Q. Is the mill operating under the same tonnage conditions it did when there were two men on grave yard?

A. Slightly over the tonnage because settling always hampered the tonnage of the Summit King and we have this added time to pump it out and we are putting more tonnage per hour through [158] than we did when operating three regular shifts.

(Testimony of Raymond L. Clawson.)

Q. Do you find the operation under one-man shift satisfactory?

A. It is the highest extraction that we ever had in the period of the mill.

Q. You heard Mr. Fox's testimony to the effect that the men were kept so busy they didn't have time for lunch? A. Yes.

Q. Is that true, Mr. Clawson?

A. No, because as I said, the men I have there at the present time are operating with one man and they still have time for their lunch, although at the present time when they are operating one man, they are getting paid for eight hours' work.

Q. What was the reason then for employing a second man on these shifts?

A. As I said previously, it was against my judgment, but the management preferred to do it so that we have one man to relieve the other man and also at the time when I took charge of the mill there was no one living at the plant and a man would be absolutely alone.

Q. I believe you also testified a man had 50 per cent of the time, the ball mill man and solution man, 50 per cent of his time free of manual duties?

A. Yes, and to prove that at the present I have a man there operating all alone who is sixty-four years' old and he has time to do, and does perform, the duties of both what used to be the ball and solution man's duties.

Mr. Thatcher: You may inquire.

(Testimony of Raymond L. Clawson.)

The Court: I think we will take our recess at this time.

(Recess taken at 2:50 P. M.) [159]

3:03 P. M.

MR. CLAWSON

resumed the witness stand.

Cross-Examination

By Mr. Scanlan:

Q. Mr. Clawson, is the Summit King Mines mill operating at the present time?

A. It was day before yesterday when I left there. I haven't been in contact with it since.

Q. And the entire mill operation is running?

A. Not the entire mill. As I stated a while ago, we operate the ball mill now as we get the ore. Some days it is ten hours, some days as much as sixteen hours. The rest of the mill is all in operation.

Q. But the ball mill is not operating twenty-four hours?

A. No, because we are short of labor in the mine and can't get ahead sufficient ore.

Q. How long has it been not operating twenty-four hours? A. Well, for thirty days.

Q. So that your testimony is now that one man is doing the work now that two men formerly done is not correct, isn't that true?

A. No, I wouldn't say it wasn't correct.

(Testimony of Raymond L. Clawson.)

Q. If he doesn't have the ball mill to look after, then he doesn't do as much work?

A. One man operates the whole mill if we have the ore, including the ball mill.

Q. And if the ball mill isn't operating, he doesn't have as much work?

A. He has all the solution man's work and a few duties might come up that the ball mill man put in when it is down.

Q. What is the first mill you ever worked in?

[160]

A. The Dexter mill in Tuscarora.

Q. That worked three shifts?

A. At that time it worked two shifts; that is, worked 12-hour shifts when I first went to work in mills.

Q. What was your first employment in the mill?

A. As helper.

Q. How long did you work as helper?

A. Thirty days as helper, then I became ball man.

Q. Have you ever had any man at the Summit King mill that you could put in full charge of the ball mill within two days?

A. I can't say I could let him alone over the whole period, but I could leave him there for several hours at a time.

Q. Could you leave him there for a whole shift?

A. Yes, I have had one particular man that I could.

Q. Without previous mill experience?

(Testimony of Raymond L. Clawson.)

A. What little he had before. It was Mr. Dustin.

Q. And you gave him charge of the ball mill after two days' practice?

A. Pardon. I never did give the ball mill man charge of the mill. The solution man, under my management of the mill, has always been directing the mill. That man was his helper.

Q. Then a mill man can be qualified as a mill man with just a few days' experience?

A. Not as a thorough mill man, no.

Q. How many of these men, plaintiffs in this case, started work in the mill without any previous experience?

A. Could I have the names of those plaintiffs read?

Q. You may read them. [161]

A. One man.

Q. Just one man? A. John Jones.

Q. And when he started work at the Summit King in what capacity did he go to work?

A. As a ball mill man.

Q. How long, about?

A. Right away. He was put down as a ball mill man—no, pardon, you say when he went to work in the mill?

Q. Yes.

A. In the mill I had him first as a laborer, had him grubbing out for my house.

Q. For how long?

A. Well, I would say a matter of—pretty hard

(Testimony of Raymond L. Clawson.)

to say, that was in 1940—several days, and then I had a chance to let him go in the mine steady job and he got a job in the mine.

Q. In your experience as a mill man, Mr. Clawson, isn't it customary for mills to run twenty-four hours generally?

A. Well, yes, a cyanide and counter-current cyanide plant, as we have out there, it is customary.

Q. And isn't it customary for all mills to work eight-hour shifts?

A. I would change to say yes before the wage and hour act went into effect.

Q. And isn't it customary for all mill men to get paid for eight-hour shifts, including the time they take out for lunch?

A. Up until the time of the wage and hour act, but almost all mills are working less than eight hours now. [162]

Q. The wage and hour law has had considerable effect in changing the practice of employment of men, has it not?

A. It has.

Q. And particularly in cutting down overtime hours, isn't that correct?

A. Well, yes, it does cut down overtime in this particular respect—if you work them the straight hours, they naturally would be getting an hour every day overtime.

Q. And at the time Summit King started operating, the maximum was 42 hours per week and if time was worked over that, they got time and a half for all hours over 42 hours?

(Testimony of Raymond L. Clawson.)

A. Now I didn't take charge of the mill until May, 1940 and what happened to these men before that, they weren't under my jurisdiction. I was only in charge times when the superintendent was gone once or twice on sick leave, then I took charge.

Q. Don't you know, or do you know, between October 24 1939 and October 1940 the maximum hours were 42 hours?

A. Well now we weren't in operation in October, 1939.

Q. No, that is true, but we will put it between January, 1940, and October, 1940.

A. That——

Q. That the maximum hours was 42 hours per week?

A. I couldn't say. It was 42 hours up to the time the wage hour act come into effect, whatever date that was, 40 hours, and then it was changed immediately and notice was posted ahead of time that we were to get time and a half for any time over 40 hours.

Q. And the men worked six days a week, did they not?

A. As a rule. Sometimes they worked seven days a week. [163]

Q. But generally the operators worked six days a week? A. They did.

Q. And if they worked seven hours per day for six days, they would be entitled to two hours overtime, would they not? A. They would.

(Testimony of Raymond L. Clawson.)

Q. And if they worked eight hours for six days per week, they would be entitled to six hours overtime?

A. You mean six hours a day or six hours a week?

Q. A week overtime.

A. If they worked six eight-hour shifts after the period of 40-hour shifts, yes.

Q. And was that not the reason for deducting an hour each day, so as to keep the men within the 42-hour period at first?

A. I can't say it was, no.

Q. Wasn't it the reason for marking them up at seven hours per day, in order to reduce the overtime?

A. No, I never refused a man any overtime in my life. The fact is, the management know that I have given men that worked hard on certain jobs of overtime, I gave them an extra hour.

Q. Were most of the men within the mill for the eight-hour periods of each shift?

A. They were in or around the mill, yes.

Q. And they were available, within call, if you needed them at any time?

A. I can't say to that because one man in particular, I hunted him over an hour and couldn't find him and we had a very small mill.

Q. Speaking about the mill, were they not available to your call? [164]

A. Most every man was within calling distance, yes. Outside of one or two men, practically every

(Testimony of Raymond L. Clawson.)

man spent his time in the mill, even his leisure time.

Q. And they were in the mill even during what you call leisure time?

A. Yes, or there during most of it.

Q. And subject to your call or the foreman's, or anybody else's call who was there?

A. There was 'only one man in authority in that mill after I took charge and that was myself. I directed all the men myself.

Q. And you controlled the discipline of the mill?

A. That was my duties.

Q. And had the right to discharge men?

A. I did.

Q. You called the attention of different men at different times as to taking what you thought too much time at the lunch period sitting around?

A. I did.

Q. And you also called the attention of different men to reading.

A. I did.

Q. On shift?

A. Only when I happened to be there long enough to know that they had overstayed their time?

Q. Did you ever have occasion to discharge any man for taking too much time off in the mill?

A. No, I can't say, not directly for taking too much time, only that in my opinion that he took too much time and got into jack- [165] pots in the mill, had serious trouble in the mill from not being on shift.

Q. Did you ever discharge a man for that?

(Testimony of Raymond L. Clawson.)

A. Yes, I did. That is, I discharged him this way—it was Mr. O'Neill, and they got me out at five o'clock in the morning and he had three agitators stuck and had lost three feet of solution. Mr. Childers left at 10:30, which I was over there, and he claimed Mr. Childers was leaving him in bad shape, stuck agitators, had the mill down and no solution to run through. I told him if a man couldn't straighten his mill out in five hours, he wasn't a mill man and the best thing he could do was to quit because he would be through at seven o'clock.

Q. But that wasn't taking too much time off for lunch? A. No, it wasn't.

Q. Did you ever discharge a man for reading on shift? A. No, sir.

Q. Then, Mr. Clawson, if your evidence upon the examination is to the effect that you called the attention of the men for taking too much time for lunch, for reading too much, and you did that several times, then, Mr. Clawson, you were not exercising very much discipline over those men, were you?

A. Yes, I would say I did, but if counsel has ever worked men and you are leaving men at their own discretion over the night shift period, the less you antagonize men the better operation you have. You have different dispositions of men to handle and you have to handle them all a little bit different, you can't make a set rule.

Q. Isn't it a fact, Mr. Clawson, that these men whom you reprimanded about reading on

(Testimony of Raymond L. Clawson.)

shift and you found reading afterward, were not paying any attention to your orders?

A. I can't say they were not paying any attention to my orders, but as I said, they would tell me that was their noon hour.

Q. Would you always take their word for it?

A. I had to, only the particular times when I knew that they had overstayed their noon hour.

Q. But still you never fired anybody for taking too much time?

A. I can't say I did. Pardon me, you said no one—now I did fire a man for taking too much time, but he was not operating night shift. It was Mr. Orville Hutchins.

Q. You have been living out at the mill ever since the early part of the operations commenced?

A. Since October 1, 1940.

Q. You live with your family there?

A. I do.

Q. When do you have your lunch in the day time?

A. Usually after twelve o'clock or sometimes as late as three o'clock, whenever I get time, but very seldom I ever take lunch——

Q. That would depend upon how the mill was running?

A. It would depend upon many things. Possibly Mr. Dobson would be out there. He usually came around 11:00 or 10:30. Sometimes I had to be in conference with him about different things. A man in charge of a plant can't have any given hour.

(Testimony of Raymond L. Clawson.)

Q. Consequently, Mr. Clawson, you couldn't tell very definitely whether or not a man was taking too much time for eating his lunch?

A. At times, yes, because I spent practically all my time in the [167] mill.

Q. Well, most of them would eat about the same time you did?

A. No, they did not. Most of them ate at 11:00 o'clock.

Q. In the day time?

A. In the day time, yes sir.

Q. In the operation of a mill, such as the Summit King mill, very much depends upon continuous flow of the ore and the pulp through the mill?

A. The balancing of that.

Q. And the efficiency of the mill is judged a good deal by the continuous flow of ore through the mill, is that right?

A. In one sense, yes. That is quite a deep question there. It varies. You see that takes 72 hours from the time that ore goes into that mill until it comes out and there are a lot of matters to catch those things up before it goes through. It isn't like a flotation mill.

Q. So that as a matter of fact, while the mill is continuously operating by virtue of your running in ore, then that mill is running efficiently, is it not?

A. Not necessarily, no.

Q. Well, generally speaking, is it not?

A. Efficiently mechanically maybe.

(Testimony of Raymond L. Clawson.)

Q. Well, the main purpose of a mill, of course, is to get the ore through and save the values?

A. Exactly.

Q. And that can only be done by getting the pulp, the ore, everything through the mill, is that right?

A. No, I don't say that is right. Sometimes you hold it right [168] there in the mill to get the efficiency.

Q. So long as the mill is running continuously, like a ball mill, is running smoothly, there isn't very much for a ball mill man to do?

A. Not if it is running smoothly, no.

Q. And consequently you wouldn't expect him to be running up and down if there was nothing to do?

A. I never did. I think the men will testify that that is one thing I never did expect.

Q. And the same with the solution man, if things were operating properly and he was taking his tests, samples, etc., and the pumps were operating correctly, there wasn't very much for him to do, was there?

A. Not in this particular mill, no.

Q. Therefore, isn't it customary in this mill, and all other mills, for the men to sit around, lean against the rail or something like that, when things are running smoothly?

A. I can say this is the only mill I have seen they have time to sit around. They have done it before in other operations before this that I had,

(Testimony of Raymond L. Clawson.)

and I fired several of them for sitting around, but not because they were neglecting their duties.

Q. If the ball mill was running smoothly and every mechanical contrivance in connection with it, what would you expect a ball mill man to be doing?

A. To do anything his solution man might tell him to do.

Q. Well, if the ball mill is running very smoothly, would there be anything a solution man might tell him to do?

A. Yes, he could tell him. He had the privilege of making him [169] do any of his work he might want him to do.

Q. What was necessary if the mill was running smoothly?

A. Now that goes into a question that the individual thing would have to be looked at to see whether it would be necessary or not.

Q. Doesn't the greatest part of the mill man's duty lie in observation and hearing?

A. A great per cent of it. That is, I wouldn't say a great per cent, I shouldn't say that—I would say one-third of it.

Q. Well, would you say one-half of it?

A. No, I wouldn't because in that particular mill, where the men usually congregate, they can't see the mill, only the ball mill, but that is only a very small part of the plant.

Q. I am referring to the ball mill man.

A. Oh, well, speaking of the mill we speak—pardon me, but when we speak of the mill we speak

(Testimony of Raymond L. Clawson.)

of the whole operating unit and the other we speak of as the grinding unit or the ball mill.

Q. Isn't the efficiency of the mill man determined a great deal by his ability to keep the mill running smoothly? A. Yes, sir.

Q. And if he does keep it running smoothly, he doesn't have to use his hands very much?

A. Not a great deal. As I testified, he doesn't spend a great deal of time, it can be done in as little as ten minutes.

Q. In other words, some mill men don't need to put in actual working time only a very small portion of their time?

A. There is a great deal of difference in the individual.

Q. Other men might be operating the mill and simply be on the [170] jump most of the time, isn't that a fact?

A. As in any line of business, a man can be inefficient and do that, yes.

Q. And a mill man's sense of hearing goes a long way with a ball mill man, does it not?

A. Sense of hearing and sight.

Q. And sight together? A. Both.

Q. So that a mill man does not use his hands like a miner does?

A. No; mill men are really semi-skilled labor, or you might even call them skilled labor.

Q. And that is the principal part of the schedule, in keeping the mill operating as smoothly as he can?

(Testimony of Raymond L. Clawson.)

A. Exactly, that is why they usually get more money.

Q. And very frequently in a mill there are things that go wrong very suddenly and very unexpectedly, isn't that true?

A. It can happen.

Q. And it does happen very often?

A. No, I wouldn't say very often. I would say very seldom.

Q. And on such occasions a man must act quickly and promptly in handling his work?

A. He should. They do not always do it.

Q. And for that reason a man generally keeps in close proximity to his work, so he can see or hear if anything goes wrong?

A. He should.

Q. And for that reason men are kept usually in the mill during the period of their eating lunch?

A. One man; I should say there should be one man in the plant. [171]

Q. Don't sometimes things happen that require two men to attend to?

A. I will say this, that an efficient mill man in that particular plant, there is nothing outside of mechanical adjustments that one man couldn't do. That is, however, so far——

Q. Did you every have occasion to call any man to your assistance or help when you were trying to adjust something?

A. Yes, I often had. That isn't my particular job, to be doing mechanical labor. I am supposed

(Testimony of Raymond L. Clawson.)

to be the overseer, although I do do mechanical labor, but oftentimes I call different men if they are on shift. In most mills mill men have to do their own packing of pumps and all those things that they never had to touch in this mill, never was allowed to do so, outside of one particular case.

Q. Only one time?

A. That is the only time while I have been in charge, of time that was put on the record, to my knowledge. They may have done it unbeknownst to me.

Q. Did you ever have any man assist you in doing something you were trying to do?

A. Naturally, every mill foreman will do that. That is the test of the efficiency of the mill. The foreman wouldn't go and do any of the labor for his men. They are being paid for that work.

Q. Did the Summit King mill ever operate with one man between the 2nd of January, 1940 and 26th of April, 1942?

A. Not to my knowledge, never. Now I will say that this way, that we had two men on a shift every time I know of. Not to [172] my knowledge.

Q. They were on shift for eight hours, were they not?

A. No, on shift for seven hours.

Q. Were they not within the mill or call of anybody within the mill for eight hours?

A. Not always, because I even saw them as far as the Getchel shaft.

Q. How far is that away?

(Testimony of Raymond L. Clawson.)

A. As far as my residence, six or seven or eight hundred feet. That is a guess. Right out at my house. I sat in my living room and I saw them. That is, I saw these particular men.

Q. Was that one of these plaintiffs?

A. Yes.

Q. Is he the only one?

A. The only one I ever saw at that particular place, yes.

Q. Were the men ever permitted to go home before their eight-hour period was up?

A. I can't say that they had an eight-hour period. Our period was seven hours and seven hours eleven minutes or seven hours twelve minutes, but the period of staying at the mine, for instance day shift, was from seven o'clock in the morning until three p. m. in the afternoon.

Q. What was the afternoon shift?

A. From three p. m. until 11 p. m.

Q. And grave yard shift?

A. From 11 p. m. to 7 a. m.

Q. And each one of these operating men were on the mining property around the mill during those entire eight hours? [173]

A. I wouldn't say that they positively were. They could have went to the highway for all my knowledge, in their period off.

Q. Do you know that any one did go to the highway?

A. No, I don't, but that is the only place they

(Testimony of Raymond L. Clawson.)

could go to go off the property without taking a longer period than they do off.

Q. You don't know of any man amongst these eleven plaintiffs who went off of the company property at any time within their eight-hour period? A. Yes.

Q. Who?

A. Orville Hutchins. That is the reason I fired him. He left at 12:00 o'clock at noon one day, on a Saturday, and put in his time for his seven hours, and when he came back Monday morning I let him go.

Q. And if any of the other men went away from the property during the eight-hour period, they would have been fired?

A. No; if it was his time off, he could do as he pleased.

Q. But you don't know that they went away from the property at any time?

A. Never, only the one man.

Q. You stated, I believe, Mr. Childers was neglectful of his work? A. I did.

Q. In what way was he neglectful?

A. In getting his solutions balanced and density of tanks balanced.

Q. For how long a period had he been neglectful of that work?

A. For some time before he left. The fact is, the point of it [174] was, it was under his direction that I had a bad classification, which is the ball mill and solution man's duty. I check their individual

(Testimony of Raymond L. Clawson.)

classifier and then I check their individual No. 1 Dorr pump discharge over a period of weeks and they were neglecting their classifier and were losing values on account of coarse classification. These things were caught over a matter of a month's period there that time. This caused me extra work, caused the laboratories extra work to check on it.

Q. You heard Mr. Childers testify as to his mill experience, did you not? A. I did.

Q. And you didn't think he was competent?

A. I didn't say Mr. Childers couldn't be competent. Mr. Childers could be a very very competent mill man if he has a mind to.

Q. If the period of employment was considered to be seven hours, why were the men not permitted to go home after the seven-hour period?

A. As Mr. Dobson said previously, they were kept there to relieve the other man on his lunch period and for a safety measure more than anything else.

Q. Could they might have had a swing shift in there?

A. It is possible. The fact is, it is possible to work men only four-hour shifts. I have seen it where they only worked four-hour shifts in one place.

Q. But it was never done, was it, to permit men to go away after being out there for seven hours?

A. Not when they were out there just for the seven hours, no, not the shift men. [175]

Q. They were out there for eight hours?

(Testimony of Raymond L. Clawson.)

A. They were supposed to be on the property; for instance, a shift was from seven in the morning until three in the afternoon.

Mr. Scanlan: That is all.

Re-Direct Examination.

By Mr. Thatcher:

Q. Mr. Clawson, would you consider that these men were subject to call for each and every hour of the eight hours of their shift?

A. No, I wouldn't consider it, if they told me it was their noon hour. The fact is, many times I have made adjustments for the men and have told them that I had done it.

Mr. Thatcher: That is all.

Mr. Scanlan: That is all.

Mr. Thatcher: I would like at this time to offer in evidence the time cards of Collision Gilbreth——

Clerk: Defendant's I.

Mr. Thatcher: Orville Hutchins——

Clerk, Defendant's J.

Mr. Thatcher: R. E. Sutton——

Clerk: Defendant's K.

Mr. Thatcher: Philip Ferris——

Clerk: Defendant's L.

Mr. Thatcher: Merrill C. Hutchins——

Clerk: Defendant's M.

Mr. Thatcher: N. N. Dustin——

Clerk: Defendant's N.

Mr. Thatcher: Edward Francis O'Neill——

Clerk: Defendant's O.

(Testimony of Raymond L. Clawson.)

Mr. Thatcher: And John Jones. [176]

Clerk: Defendant's P.

Mr. Scanlan: No objections.

The Court: They may be admitted.

Mr. Thatcher: Defendant rests.

REBUTTAL TESTIMONY

MR. FOX

was called in rebuttal and testified as follows:

Direct Examination.

By Mr. Scanlan:

Q. Mr. Fox, you heard Mr. Dobson testify as to your taking showers in the change room out there?

A. Yes.

Q. Were you in the habit of doing that?

A. No, I never did take a shower all the time I worked out there.

Q. Never at all? A. No, never.

Q. You heard also Mr. Clawson's testimony?

A. Yes.

Q. Did Mr. Clawson ever call you to help him at some work?

A. Yes, he has called me when I have been eating my lunch, my lunch bucket open and actually eating, to help stop precipitation.

Q. And has he called you more than once?

A. I would say yes; he has called me two or three times for that particular duty.

Mr. Scanlan: That is all.

Mr. Thatcher: I have no question.

Mr. Scanlan: I think that is all.

Mr. Thatcher: We rest.

Mr. Scanlan: Plaintiff rests. [177]

Mr. Thatcher: I think I would like a transcript, if the court please, and order a copy for the court and one for counsel.

The Court: The court would prefer to have one.

Mr. Thatcher: I certainly would like to have one. We are perfectly willing to pay for it if Mr. Scanlan doesn't want a copy.

Mr. Scanlan: Oh, I will take it too.

Mr. Thatcher: I suggest this, because of the fact these men are working men, I suggest at this time that the defendant temporarily pay three-fourths of the cost of the transcript and the plaintiffs one-fourth.

Mr. Scanlan: Well, there is no objection to that.

The Court: If counsel agrees upon that, that will be the order. Then a copy of the transcript will be made by the official reporter under the terms stated and the matter will be submitted on briefs to be filed, subject to the further order of the court.

(Court recessed at 3:30 P. M.)

(Duly certified by Marie McIntyre, Official Reporter.)

[Endorsed]: Filed Oct. 27, 1942. [178]

[Endorsed]: No. 10526. United States Circuit Court of Appeals for the Ninth Circuit. Al C. Fox, Collison Gilbreth, R. E. Sutton, Orville Hutchins, John S. Jones, Nephi N. Dustin, Merrill C. Hutchins, H. M. Childers, Warren S. Morden, Edward F. O'Neill and Philip Edgar Ferris, Appellants vs. Summit King Mines, Limited, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Nevada.

Filed August 13, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 10526

AL C. FOX, COLLISON GILBRETH, R. E.
SUTTON, ORVILLE HUTCHINS, JOHN S.
JONES, NEPHI N. DUSTIN, MERRILL C.
HUTCHINS, H. M. CHILDERS, WARREN
S. MORDEN, EDWARD F. O'NEILL,
PHILIP EDGAR FERRIS,

•
Appellants

vs.

SUMMIT KING MINES, LIMITED,
Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF PARTS OF THE RECORD ON
WHICH APPELLANT WILL RELY ON
APPEAL

Comes Now the above named appellants, and, pursuant to Paragraph 6 or Rule 19 of the rules of the above entitled Court, makes the following statement of the points on which they intend to rely on appeal, and the following designation of the parts of the record which they think necessary for the consideration thereof:

POINT 1

(a) That the District Court erred in its Decision and Order Denying Motion for New Trial (Cert. Record, pages 25 and 26) and holding that said District Court was without jurisdiction, nothwith-

standing the decision of the United States Circuit Court of Appeals, Eighth Circuit, on June 30, 1942, in the case of Canyon Corporation versus National Labor Relations Board, 128 Fed. (2d) 953.

For the consideration of Subdivision (a), see the following portions of the certified record: Paragraphs I, II, III, and IV, of plaintiffs' Amended Complaint, Cert. Record, pages 2-4; Paragraphs I, II, and III, of defendant's Answer, Cert. Record, pages 10 and 11; Stipulation pertaining to issues involved and reducing the same, Cert. Record, pages 14 and 15; Opinion and Decision, Cert. Record, pages 16 to 21, inclusive; Motion for New Trial or Re-Hearing, Cert. Record, pages 22 and 23; Order Denying Motion for New Trial, Cert. Record, pages 25 and 26; Findings of Fact and Conclusions of Law, Cert. Record, pages 27 to 30, inclusive; Judgment, Cert. Record, pages 31 and 32.

(b) That the District Court erred in holding as a Conclusion of the trial Court that plaintiffs failed to establish that they performed any substantial amount of labor during the lunch hour period over and above that for which they were paid for overtime.

For a consideration of this point see (Cert. Record) Opinion and Decision, pages 16-21, Paragraphs V, VI, and VII, of Amended Complaint, pages 4-8, Stipulation reducing issues, pages 14 and 15; Transcript of Evidence: Al Fox, pages 4, 5, 7, 8, 9, 10, 11, 12, 14, 15, 27, 28, 30, 36, 41, 43, 45, 46, 47, 48, 49, 100; testimony of H. M. Childers, pages pages 52,

54, 55, 57, 58, 59, 60, 62, 63, 101, 107; testimony of Warren S. Morden, pages 84, 85, 87, 89, 99; testimony of P. G. Dobson, witness for defendant, pages 116, 119, 122, 133, 134, 135; testimony of Raymond S. Clawson, witness for defendant, pages 139, 140, 143, 173, 174, 175, 176; Defendant's Exhibits C, D, E, and F.

POINT 2

That the District Court erred in its Finding of Fact (Cert. Record, Paragraph IV, page 28) that none of the plaintiffs during his period of employment by defendant was engaged in commerce or in the production of goods for commerce.

For the consideration of this point see the following portions of the Certified Record: Paragraphs I, II, III, and IV of Plaintiffs' Amended Complaint, pages 2-4; Paragraphs I, II, and III, of defendant's Answer, pages 10 and 11; Stipulation pertaining to reduction of issues, pages 14 and 15; Opinion and Decision, pages 15 to 21, inclusive; Motion for New Trial or Re-Hearing, pages 22 and 23; Order Denying Motion for New Trial, pages 25 and 28; Findings of Fact and Conclusions of Law, pages 27 to 30, inclusive; Judgment, pages 31 and 32.

POINT 3

(a) That the District Court erred in its Finding of Fact (Cert. Record, Paragraphs V, pages 28 and 29) that said mill of the defendant operated for a period of twenty-four hours per day, divided into three shifts of eight hours each and that each of

the plaintiffs performed work, labor and service in said mill for a period of seven hours during the particular shift upon which he was working and that each of the plaintiffs was free from duty for a period of one hour during each shift for the purpose of eating his lunch.

For the consideration of this point, see the following portions of the Certified Record: Plaintiffs' Amended Complaint, Paragraphs V, VI, and VII, pages 4-8; Stipulation reducing issues, Paragraphs II and III; Opinion and Decision, pages 16-21; Defendant's Exhibit A, "Notice to Mill Employees", page 36; Defendant's Exhibit B, "Attention Mill Men", page 37; three time cards selected at random by Clerk of the District Court from defendant's Exhibits E to P and three solution or work reports selected at random by Clerk of the District Court from defendants' Exhibits C, D, and F; also, transcript of the evidence, testimony of Al C. Fox, pages 4, 5, 7, 8, 9, 10, 11, 12, 14, 15, 28, 30, 41, 43, 45, 46, 47, 48, 49, 100; testimony of H. M. Childers, pages 52, 54, 55, 57, 58, 59, 60, 62, 63, 101, 107; testimony of Warren S. Morden, pages 84, 85, 87, 88, 89, 99; testimony of P. G. Dobson, witness for defendant, pages 116, 118, 119, 122, 133, 134, 135; testimony of Raymond S. Clawson, witness for the defendant, pages 137, 138, 139, 140, 143, 145, 159, 164, 165, 166, 170, 171, 173, 174, 175, 176.

(b) That the District Court erred in its Finding of Fact (Cert. Record, Paragraph V, page 29) that each of said plaintiffs was paid in full by defendant at the rate of wages established by agree-

ment between plaintiffs and defendant, which wage was in excess of that required by the Fair Labor Standards Act.

For consideration of this point see the following portions of the Certified Record: Amended Complaint, Paragraphs V, VI, and VII; Stipulation reducing issues, Paragraphs II and III; Defendant's Exhibit A, "Notice to Mill Employees", page 36; defendant's Exhibit B, "Attention Mill Men", page 37; three time cards selected at random by Clerk of the District Court; three solution or work reports selected at random by Clerk of the District Court; testimony of Warren S. Morden, page 99.

(c) That the District Court erred in its Finding of Fact (Cert Record, Paragraph V, page 29) that each of said plaintiffs was paid overtime at the rate of one and one-half times the amount of the agreed wage for all hours worked in excess of forty-two hours a week during the period of employment from January, 1940, to October, 1940; that from October, 1940, to the termination of the employment of each of the plaintiffs, each of said plaintiffs was paid overtime at the rate of one and one-half times the agreed wage for all hours worked in excess of forty hours per week.

For consideration of this point see same designations as used for Subdivision (b) above.

POINT 4

That the District Court erred in its Finding of Fact (Cert. Record, Paragraphs VI, page 29) that

none of the plaintiffs made any claim for overtime other than that paid by defendant during the period of their employment by defendant and that none of said plaintiffs made any claim for the payment of overtime until the making of demand prior to the filing of the action in the present case.

For the consideration of this point, see the following portions of the Certified Record: Defendant's Exhibit A, "Notice to Mill Employees"; Defendant's Exhibit B, "Rules for Mill Men"; time cards selected by the District Court Clerk at random from defendant's Exhibits E to P, inclusive; work reports selected at random by Clerk of the District Court from defendant's Exhibits C. D. and F; Transcript of Evidence, Testimony of Al C. Fox, page 14; testimony of Warren S. Morden, page 88, testimony of H. M. Childers, pages 55, 56, 107.

POINT 5

That the District Court erred in its Finding of Fact (Cert. Record, Paragraph VII, page 29) that none of the plaintiffs performed any work or labor for defendant during the lunch hour or at any other time for which he did not receive pay for overtime at one and one-half times the agreed wage.

For the consideration of this point, see the following portions of the Certified Record: Defendant's Exhibit A, "Notice to Mill Employees"; Defendant's Exhibit B, "Rules for Mill Men"; time cards selected by the District Court Clerk at random from defendant's Exhibits E to P, inclusive;

work reports selected at random by Clerk of District Court from defendant's Exhibits C, D, and F; Transcript of Evidence, testimony of Al C. Fox, pages 4, 5, 9, 10, 13, 14, 15, 17, 28, 30, 41, 43, 45, 46, 49, 100; testimony of H. M. Childers, pages 54, 55, 57, 58, 59, 60, 62, 63, 101, 107; testimony of Warren S. Morden, pages 84, 85, 87, 88, 89, 99; testimony of P. G. Dobson, a witness for the defendant, pages 119, 122, 133, 134, 135; testimony of Raymond L. Clawson, a witness for the defendant, pages 137, 138, 139, 140, 143, 145, 159, 164, 165, 166, 170, 171, 173, 174, 175, 176.

POINT 6

That the District Court erred in its Finding of Fact (Court Record, Paragraph VIII, page 29) that the allegations contained in Paragraph IV of the plaintiff's Amended Complaint are not true.

For the consideration of this point see the following portions of the Certified Record: Paragraphs I, II, III, and IV, of plaintiffs' Amended Complaint, pages 2-4; Paragraphs I, II, and III, of defendant's Answer, pages 10 and 11; Stipulation pertaining to reduction of issues, pages 14 and 15; Opinion and Decision, pages 15 to 21; inclusive; Motion for New Trial or Re-Hearing, pages 22 and 23; Order Denying Motion for New Trial or Re-Hearing, pages 25 and 28; Findings of Fact and Conclusions of Law, pages 27 to 30, inclusive; Judgment, pages 31 and 32.

POINT 7

That the District Court erred in its Finding of Fact (Cert. Record, Paragraph VIII, page 29) that the allegations contained in Paragraph V of plaintiffs' Amended Complaint are not true.

For the consideration of this point, see the following portions of the Certified Record: Plaintiffs' Amended Complaint, Paragraphs V, VI, and VII, pages 4-8; Stipulation reducing issues, Paragraphs II and III; Opinion and Decision, pages 16-21; Defendant's Exhibit A, "Notice to Mill Employees", page 36; Defendant's Exhibit B, "Attention Mill Men", page 37; three time cards selected at random by Clerk of the District Court from defendant's Exhibits E to P and three solution or work reports selected at random by Clerk of the District Court from defendant's Exhibits C, D, and F; also, transcript of the evidence, testimony of Al C. Fox, pages 4, 5, 7, 8, 9, 10, 11, 12, 14, 15, 28, 30, 41, 43, 45, 46, 47, 48, 49, 100; testimony of H. M. Childers, pages 52, 54, 55, 57, 58, 59, 60, 62, 63, 101, 107; testimony of Warren S. Morden, pages 84, 85, 87, 88, 89, 99; testimony of P. G. Dobson, witness for defendant, pages 116, 118, 119, 122, 133, 134, 135; testimony of Raymond S. Clawson, witness for the defendant, pages 137, 138, 139, 140, 143, 145, 159, 164, 165, 166, 170, 171, 173, 174, 175, 176.

POINT 8

That the District Court erred in its Finding of Fact (Cert. Record, Paragraph VIII, page 29) that

the allegations contained in Paragraph VII of plaintiffs' Amended Complaint are not true.

For a consideration of this point see designation of Cert. Record and Transcript of Evidence designated under Point 7, above.

POINT 9

That the Court erred in its Conclusion of Law (Cert. Record, Paragraph I, page 30) that there had been no violation of Sections 6 or 7 of the Fair Labor Standards Act, being Title 29 U.S.C.A. Sections 206 and 207, by the defendant.

For the consideration of this point the entire record, transcript of evidence, and all of the exhibits will be needed.

POINT 10

That the Court erred in its Conclusions of Law (Cert. Record, Paragraph II, page 30) that the plaintiffs are not entitled to the relief asked for in their Amended Complaint and that the defendant is entitled to judgment herein.

For the consideration of this point, the entire record, transcript of evidence, and all of the exhibits will be needed.

POINT 11

That the Court erred in its Conclusions of Law (Cert. Record, Paragraph III, page 30) that the defendant is entitled to recover of and from plaintiffs its costs herein incurred.

For the consideration of this point, the entire record, transcript of evidence, and all of the exhibits will be needed.

POINT 12

That the District Court erred in entering its judgment (Cert. Record, pages 31 and 32) that plaintiffs take nothing by their Complaint and that defendant have and recover from the plaintiffs the costs of said defendant, for the reason that said judgment is contrary to the law applicable to the issues, evidence and other proof, and in particular contrary to the law applicable under the Fair Labor Standards Act, and the jurisdiction of District Courts of the United States involving the production of gold and silver in one state and shipping the same to a United States Mint in another state and which jurisdictional question we believe is correctly defined by the Circuit Court of Appeals for the Eighth Circuit, in the case of Canyon Corporation versus National Labor Relations Board, 128 Fed. (2d) 953.

For the consideration of this point, the entire record, transcript of evidence, and all of the exhibits will be needed.

Dated this 6th day of August, 1943.

MARTIN J. SCANLAN

Attorney for Appellants

308 Lyon Building

Reno, Nevada

Service of a copy of the foregoing Statement and Designation of Points on which Appellants will Rely on Appeal is hereby admitted this 6th day of August, 1943.

THATCHER AND WOOD-
BURN

Attorneys for Appellee

206 North Virginia St.

Reno, Nevada

[Endorsed]: Filed Aug. 13, 1943. Paul P.
O'Brien, Clerk.



No. 10,526

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

AL C. FOX, COLLISON GILBRETH, R. E. SUT-
TON, ORVILLE HUTCHINS, JOHN S. JONES,
NEPHI N. DUSTIN, MERRILL C. HUTCHINS,
H. M. CHILDERS, WARREN S. MORDEN, ED-
WARD F. O'NEILL, PHILIP EDGAR FERRIS,
Appellants,

VS.

SUMMIT KING MINES, LIMITED
(a corporation),

Appellee.

BRIEF FOR APPELLANTS.

MARTIN J. SCANLAN,

Lyon Building, Reno, Nevada,

Attorney for Appellants.

FILED

OCT 8 - 1943

PAUL P. O'BRIEN,
CLERK



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No. 10,526

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AL C. FOX, COLLISON GILBRETH, R. E. SUTTON, ORVILLE HUTCHINS, JOHN S. JONES, NEPHI N. DUSTIN, MERRILL C. HUTCHINS, H. M. CHILDERS, WARREN S. MORDEN, EDWARD F. O'NEILL, PHILIP EDGAR FERRIS,

Appellants,

vs.

SUMMIT KING MINES, LIMITED
(a corporation),

Appellee.

BRIEF FOR APPELLANTS.

STATEMENT AS TO PLEADINGS AND JURISDICTION.

This action was brought by the appellants in an action at law, in the United States District Court for the District of Nevada, to recover unpaid overtime wages, an additional equal amount as liquidated damages, a reasonable attorney's fee and costs, from the appellee, under the "Fair Labor Standards Act of 1938", 52 Statutes 1060; Title 29, U. S. C. A., Chapter 8, Sections 202, 203, 207, 216.

This is a class action wherein the appellants assert a right arising out of a series of transactions where

questions of law and fact common to all are involved and a common relief is sought and which was brought in accordance with subdivision (3) of Rule 23 of the Rules of Civil Procedure, for the District Courts of the United States, and alleged in paragraph I of appellants' Amended Bill of Complaint Rec. 2).

Jurisdiction of the District Court is conferred by Section 41 (8) 28 U. S. C. A. 24 (Judicial Code), (36 Statutes 1092, 38 Statutes 219) and alleged in paragraph II of appellants' Amended Bill of Complaint (Rec. 3).

The judgment entered by the United States District Court for the District of Nevada, is a final decision of said Court, and appellate jurisdiction is conferred on the above entitled Court by Section 128 (a) of the Judicial Code, as amended February 13, 1925, effective May 13, 1925 (43 Statutes 936; 28 U. S. C. A. Section 225(a), First, and 225(d).

Appellants allege in their Amended Bill of Complaint (Rec. 3), that the defendant corporation is organized and existing under and by virtue of the laws of the State of Nevada and engaged in operating a mine in Churchill County, Nevada, producing gold and silver ores and reducing the same to bullion and which ores and bullion were produced for transportation in interstate commerce and were so transported from Churchill County, Nevada, to the United States Mint at San Francisco, California, and there sold to the United States Government.

That the appellants were employed by the appellee at various times in the operation of its mill at

Churchill County, Nevada, which reduced the ore mined to precipitates and which is melted into gold and silver bullion and shipped and sold to the Mint.

That all of the appellants were employed subsequent to the enactment to the "Fair Labor Standards Act of 1938" (Chapter 8, Title 29, U. S. C. A. 201-219) and allege (Rec. 4) that they were employed for various periods of time between January 1940, and April 1, 1942, in appellee's mill or reduction works.

The appellants allege (Rec. 4) that they rendered services to the appellee for eight hours every day of their employment and were responsible to the appellee for the proper and careful operations of the machinery and equipment and for the flow, thickening, separation, sampling, and other processes of the ore through the mill for each eight hour shift, but received compensation therefor for only seven hours; that appellants also allege that each hour that they were employed over seven hours and for which they were not compensated was in excess of the maximum hours in each work week required by Section 207 of the "Fair Labor Standards Act of 1938", U. S. C. A. Title 29, and in violation of said Section 207.

That it is alleged in paragraph VI of the Amended Bill of Complaint (Rec. 5) that on or about the 22nd day of April, 1941, a controversy arose between the appellants and management relative to an increase in wages and the management agreed that the mill men would get an increase of twenty-five cents per day and thereafter the solution men were paid time and one-half for eleven minutes and the ball mill men

time and one-half for twelve minutes amounting to twenty-five cents per day respectively and in addition to their compensation received for seven hours; it was further alleged in said paragraph VI that the solution men have not been compensated for forty-nine minutes and the ball-mill men for forty-eight minutes for each day appellants were in the employ of the appellee from and after the 23rd day of April, 1941, until the termination of their employment and said increase in wages did not alter the previous working routine or time in any way and appellants continued at their employment for eight hours per day and sixty minutes during each hour and until their employment was terminated.

Appellants in paragraph VII of their Amended Bill of Complaint (Rec. 6-11) set forth an estimated itemized statement of their periods of employment, number of days employed and rate of wages per day, rate of wages per hour at time and one-half and total amount of compensation earned by each appellant and unpaid by the appellee, and amounts claimed as liquidated damages.

Appellee, by its answer (Rec. 12) denies all and specifically paragraph I, pertaining to the right of appellants to bring a class action under the Rules of Civil Procedure for United States District Courts and as conferred by the "Fair Labor Standards Act of 1938"; appellee also denies all and specifically the allegations of paragraph II of the Amended Bill of Complaint pertaining to the jurisdiction of the United States District Courts under the Judicial Code; ap-

pellee admits the allegations of paragraph III of the Amended Bill of Complaint relative to appellee being a Nevada corporation, but denies that the mining and milling of gold and silver ores and reduction of same in the State of Nevada was for transportation in interstate commerce and that said ores or minerals, or mineral products processed or reduced by appellee have been transported in interstate commerce, or sold or offered for transportation, or transported, or shipped, or delivered in interstate commerce from any part of the State of Nevada to San Francisco, California, or any other place outside of the State of Nevada; appellee denies each and every allegation of paragraph IV of said Amended Bill of Complaint pertaining to the production of gold and silver ores and reducing same to precipitates or bullion for interstate commerce, but admits that it employed said appellants for various periods of time in its mill or reduction works in the reduction of gold and silver ores; appellee denies all and singular the allegations contained in paragraph V of the Amended Bill of Complaint which alleges generally that all of the appellants were employed by the appellee and rendered services as solution men and ball-mill men in appellee's mill in Churchill County, Nevada, for a period of eight hours during each and every day that the appellants were employed and that the appellants were required to give their entire time, knowledge and experience to their work and were responsible to the appellee for the proper and careful operation of the machinery and equipment and the processes through

which the ores passed through the mill and that appellee paid a daily wage for only seven hours for each day and that the appellants rendered their time and services for one hour during each day without any compensation therefor except as modified in a subsequent paragraph (VI) and that each hour which appellants claimed to have worked without compensation was in excess of the maximum hours required by Section 207 of the "Fair Labor Standards Act of 1938" and that the appellants should be compensated for such hours or as subsequently modified after the agreement of April 22, 1941, at one and one-half times the regular rate at which appellants were employed; appellee admits all of the allegations of paragraph VI of said Amended Bill of Complaint pertaining to the controversy between the management and employees relative to a proposed increase in wages and that the agreement of April 22, 1941, provided for the solution man to be paid time and one-half for eleven minutes and the ball-mill men time and one-half for twelve minutes, but appellee denies that the solution men have not been compensated for 49 minutes and the ball-mill men for 48 minutes for each day appellants were in the employ of the appellee as solution men and ball-mill men from and after the 23rd day of April, 1941, and appellee also denies that said increase in wages did not alter the previous working routine in any way and that the appellants continued at their employment for eight hours per day and sixty minutes during each hour until termination of employment.

Appellee admits that the appellants were employed by the appellee at various rates of wages per day, but denies all of the other allegations of paragraph VII of the Amended Bill of Complaint, which paragraph contains an itemized statement of the names of appellants, periods of time employed, number of days employed during each period and rate of wages per day, rate of wages per hour at time and one-half, total amounts claimed by each appellant and a summarized statement of total unpaid overtime, liquidated damages, and which itemized statements are alleged to the best of appellants' knowledge and belief.

Appellee also alleges two affirmative defenses, to wit: that said Amended Bill of Complaint fails to state a claim upon which relief can be granted; and that the District Court is without jurisdiction of the subject matter of the action.

No reply was filed.

After the answer was filed, it was stipulated (Rec. 14) by counsel for the respective parties that appellants may file an Amended Bill of Complaint and that the Answer theretofore filed may be considered as appellee's answer to the Amended Bill of Complaint.

It was also stipulated (Rec. 15) before trial, that the appellee produced gold and silver ores in Churchill County, Nevada, and there reduced to bullion and transported by United States Mail in interstate commerce from Churchill County, Nevada, to San Francisco, California, and sold to the United States Mint.

It was further stipulated that the computations of the periods of time, number of days, rate of wages per day, was for seven hours, and rate of wages per hour was at the rate of seven hours per day with time and one-half for overtime and the total amount of compensation claimed to have been earned and unpaid as stated on pages 5, 6 and 7 of the Amended Bill of Complaint (Rec. 7-11) are correct in accordance with appellants' theory and need not be proven. It was also stipulated that the testimony of the appellants not present at the trial would be the same as those testifying as to the character of the work, mill routine, policy of management, making time and work reports and other evidence pertaining to their employment and that their testimony would substantiate the itemized statements set forth in the Amended Bill of Complaint.

The District Court which had tried the case without a jury, on the 27th day of January, 1943, filed its Opinion and Decision (Rec. 16) wherein the issues and evidence were reviewed and the Court held appellee was not engaged in interstate commerce and not subject to the provisions of the "Fair Labor Standards Act of 1938" and that the action should be dismissed and it was so ordered.

Appellants duly filed a Motion for a New Trial or Re-Hearing (Rec. 23) which was heard by the Court and after consideration (Rec. 26) held, that it was still the conclusion of the Court that the District Court was without jurisdiction, and also, that

appellants have failed to establish that they performed any substantial amount of labor during the lunch hour over and above that for which they had been compensated and that the motion for a new trial be dismissed.

That Findings of Fact and Conclusions of Law (Rec. 27) were duly filed and Judgment (Rec. 31) was entered on March 16, 1943.

Appellants filed Notice of Appeal (Rec. 32) and Bond for Costs on Appeal (Rec. 33) on May 27, 1943, and that on the 23rd day of June, 1943, the District Court made its Order (Rec. 35) to transmit the original transcript of evidence and original exhibits to the Circuit Court of Appeals and also made an Order (Rec. 37) extending time for filing record and docketing appeal to and including the 25th day of August, 1943; that on the 23rd day of June, 1943, counsel for the respective parties made and filed a stipulation (Rec. 38) designating portions of the record, proceedings and evidence to be contained in the Record on Appeal.

Thus, the appeal has been perfected in accordance with the Federal Rules of Civil Procedure; and this Court has jurisdiction of said appeal under Section 128 of the Judicial Code—U. S. C. A. Title 28, Sections 225(a), First, and 225(d).

STATEMENT OF CASE.

This action was brought by eleven employees (appellants) against the Summit King Mines, Limited, a Nevada corporation, their employer, under the "Fair Labor Standards Act of 1938" (Chapter 8, Title 29, U. S. C. A. 201-219, 52 Statutes 1060), to recover unpaid compensation which they allege to have earned and which was unpaid by the defendant corporation.

The appellants were employed in the operation of a quartz mill at appellee's mine in Churchill County, Nevada; appellee was producing from the mine gold and silver bearing ore on the same property upon which the mill was situated. The ore was brought into the mill and there ground to a fine mash and then passed through ball mills, classifiers, and the pulp went through a thickener and passed into agitators, washing thickener and into the precipitation system; the ore or pulp was kept in continuous motion throughout the entire process and by the use of cyanide the values were extracted from the ore into a solution and taken up by zinc dust and run through a press and the precipitates are taken out from time to time and melted into bullion and which was shipped by United States Mail to the Mint at San Francisco, California. The mill is operated by two diesel engines and runs continuously twenty-four hours a day and it requires approximately seventy-two hours from the time the ore enters the mill until the values are recovered.

The twenty-four hour day is divided into three shifts commencing with the day shift at 7 o'clock a. m. and ending at 3 o'clock p. m., the afternoon shift from 3 p. m. to 11 p. m., and the graveyard shift from 11 p. m. to 7 a. m. the following morning. Two men are employed on each shift in the operation of the mill, one of whom is called the ball-mill man who looks after the tonnage classifiers and ball-mill and is required to take samples from the overflow hourly to ascertain the values and for grind and to weigh the solution for tonnage and to add cyanide or lime from time to time as the samples indicate are required. The duties of the solution man is to look after the solution end of the mill, to take samples, weigh the pulp at different places for gravity, and to take care of the precipitation and to see that the solution in the tanks is kept at the right levels and to watch the diesel engines.

The solution man is recognized as being in charge of the entire mill and the superior of the ball-mill man.

The mill men made out their own time cards which were signed by the solution man and turned into the office of the mill superintendent. The work reports were filled out and turned in by each man for an eight hour shift and which showed a record of the sampling and testing for each hour during the eight hour shift.

The mill started operations on January 5, 1940, when the forty-two hour work week, under the "Fair Labor Standards Act of 1938" was in effect, and the

appellants worked at various times under the forty-two hour work week and the forty hour work week and which periods of employment are more particularly itemized in appellants' Amended Bill of Complaint (Rec. 7-11).

On the 29th day of December, 1939, and prior to the commencement of operations of the mill, a notice to the mill employees was posted in the mill which is designated defendant's Exhibit B (Rec. 67) in evidence and which notice was to the effect that the men should work seven hour shifts relieving each other one hour for lunch, the ball-mill operator to relieve the solution operator from 11 o'clock to 12 o'clock and the solution man to relieve the ball-mill man from 12 o'clock to 1 o'clock and which we assume was for the day shift but no instructions were contained in said notice relative to the lunch period on the afternoon or graveyard shifts and which notice remained posted until April 22, 1941, when a different wage scale went into effect after a controversy between the management and the employees of the mine and mill.

On April 23, 1941, another notice was posted entitled "Notice to Mill Employees on Daily Wage Basis" (Rec. 64) stating in substance and effect that in order to comply with the agreement reached April 22, 1941, whereby overtime arrangements were to be made to enable employees to earn \$1.50 more per week, instructions were that the solution man's shift including the lunch period will be eight hours as it always has been. Instead of taking one hour for lunch the solution man will take forty-nine minutes, that the

solution man should mark his time card, daily rate \$6.35 but for overtime worked put seven hours plus eleven minutes overtime and which would result in an increase of \$1.50 per week. The ball-mill men were instructed that their shift including the lunch hour will be eight hours as it always has been but instead of taking one hour for lunch you will take forty-eight minutes and to mark the time card, daily rate \$5.85, time worked seven hours plus twelve minutes overtime which would result in earning \$1.50 more per week. There is no designation in this last notice as to one man relieving the other for lunch nor did it designate any particular time for a lunch period.

The notice to mill employees on daily wage basis, appellee's Exhibit A (Rec. 64) was posted after a controversy between a committee of the miners and the mill men and the manager of the corporation. The mill men had one representative on the committee, H. M. Childers, who is one of the appellants and who testified in the District Court.

It is the contention of the appellants that they were employed for a full shift of eight hours and that any time taken by them in the eating of their lunches was in the period of their employment and while they were in attendance at their work and were required to take samples and were responsible for the proper performance of their services and the continuous operation of the mill during every hour of the eight hour shift and that the management permitted or acquiesced in and accepted such services during each hour of the eight

hour shift and the employees were required to make a report for each hour of the shift.

The appellee contends that the appellants were allowed one hour for lunch and consequently were only employed for a seven hour shift and only entitled to compensation on a basis of seven hours.

Counsel for the appellants and for the appellee filed a stipulation (Rec. 15) before trial, stipulating in substance and effect that the gold and silver ores produced by the appellee corporation were reduced to bullion and transported by United States Mail from Churchill County, Nevada, to San Francisco, California, in interstate commerce and which was there sold to the United States Mint and it was also stipulated that the computations of the period of time, number of days, rate of wages per day was for seven hours and rate of wages per hour was at the rate of seven hours per day with time and one-half for overtime and the total amount of compensation claimed to have been earned and unpaid as stated on pages 5, 6 and 7 of the appellants' Amended Bill of Complaint are correct in accordance with the appellants' theory of the case and need not be proven; and also that the testimony of the appellants not present at the trial would be practically the same as the appellants testifying, as to the same character of work, mill routine, policy of the management, making time and work reports, and other evidence of a general nature pertinent to their employment and that the appellants not present would also testify as to the number of days they were employed, the rate per day, and the rate per hour at time

and one-half overtime and the total amount claimed to be unpaid would be the same as itemized for each appellant respectively on pages 5, 6 and 7 of appellants' Amended Bill of Complaint (Rec. 7-11).

The cause went to trial before Judge F. H. Norcross without a jury and after hearing the testimony of three witnesses for the appellants and two for the appellee and documentary evidence, the Court ordered that the matter be submitted on briefs; counsel for the respective parties submitted their briefs and after consideration by the trial Court the Court, on the 27th day of January, 1943, entered its opinion and decision (Rec. 16) wherein the Court reviewed the evidence and the law applicable thereto and that it was the conclusion of the Court that the action should be dismissed and it was so ordered.

Counsel for appellants thereafter and in due time filed a motion for a new trial (Rec. 23) or rehearing and which motion was heard by the Court; that said motion was ordered submitted and subsequently Judge Norcross entered a written decision and order (Rec. 26) denying the motion for a new trial, affirming his former decision that the District Court was without jurisdiction notwithstanding the decision in the case of *Canyon Corporation v. National Labor Relations Board*, 128 Fed. (2d) 953, by reason of the fact that the Board had for consideration not only shipments of gold and silver to a United States Mint as part of its milling operations, but also, shipped slag therefrom and sold the same to a smelting company in another state; and also, it was the conclusion of the Court

that the appellants failed to establish that they performed any substantial amount of labor during the lunch hour over and above that for which they received pay for overtime.

The Findings of Fact and Conclusions of Law (Rec. 27) and Judgment (Rec. 31) of the Court were duly filed on the 16th day of March, 1943; that the appellants in the Court below duly filed notice of appeal (Rec. 32) and filed a statutory bond (Rec. 33) as security for costs and the appeal was duly presented to the Circuit Court of Appeals for the Ninth Circuit.

THE QUESTIONS INVOLVED.

The questions involved in this cause, and the manner in which they are raised, are as follows:

I.

(a) Was the appellee corporation by mining ore and operating a mill in Churchill County, Nevada, and reducing gold and silver ores to bullion for transfer and sale to a United States Mint at San Francisco, California, engaged in producing goods for interstate commerce within the coverage of the "Fair Labor Standards Act of 1938"?

(b) Was the transportation of gold and silver bullion by United States Mail from Churchill County, Nevada, to the United States Mint at San Francisco, California, and there sold to the United States Government, goods transported in interstate commerce

within the meaning of the "Fair Labor Standards Act of 1938"?

The foregoing questions are raised by the pleadings, stipulation of counsel reducing issues and evidence, and appellants' specification of errors.

II.

Were the appellants within the employ of the appellee for eight hours per day, within the definition of the term "employ" as defined by Subdivision (G), Section 203 of the "Fair Labor Standards Act of 1938", Title 29 U. S. C. A., page 448 (52 Statutes 1060), notwithstanding a notice posted by the appellee that the men will work seven hours during each shift, relieving each other one hour for lunch prior to April 23, 1941, and were paid for seven hours work and on April 23, 1941, another notice was posted to the effect that thereafter solution men will take 49 minutes and ball-mill men 48 minutes for lunch and that time cards should be filled out and were filled out accordingly; that the solution men were paid for seven hours plus time and one-half for eleven minutes and the ball-mill men were paid for seven hours plus time and one-half for twelve minutes, although solution men and ball-mill men filled out work reports for eight consecutive hours and were in and about the mill and places of employment during eight consecutive hours of each shift, taking less than the time designated for lunch by the appellee and listening, observing and attending machinery, equipment, and cyanide processes whenever necessary and being

present for the purpose of fulfilling their responsibilities for the continuous and satisfactory operation of the mill and protecting themselves, co-employees, structure, machinery and equipment from injury and damage, and were the appellants fully compensated for each work day that they were in attendance at their places of employment in appellee's mill during each eight hour shift?

The foregoing question is being raised by the pleadings, stipulation of counsel reducing the issues and evidence, and appellants' specification of errors.

SPECIFICATIONS OF ERRORS.

1.

The trial court erred in its finding of fact (No. IV, Rec. 28), that none of the appellants during his period of employment by the appellee was engaged in commerce or in the production of goods for commerce.

This finding is erroneous for the reason that exclusion from interstate commerce does not depend on the commercial nature of the article, or the existence of competitors; that the Post Office transporting gold and silver to the United States Mint in another state was not the agent of the mint and the gold and silver did not become the property of the government until it had arrived, was receipted for, inspected, and paid for; the term "goods" as used in the "Fair Labor

Standards Act of 1938" regulating wages and hours of employees engaged in producing goods for commerce, includes mining of gold and silver and shipping and selling the same to a mint in another state, since, under the Gold Reserve Act, gold may be used for industrial, professional and artistic purposes; silver may be purchased as a commodity from the producer or from the government.

2.

The trial court erred in its finding of fact (No. V, Rec. 29) that each of the appellants performed work, labor and services in appellee's mill for a period of seven hours during the particular shift upon which he was working and that each of the appellants was free from duty for a period of one hour during each shift for the purpose of eating his lunch.

This finding is erroneous for the reason that the term "employ" as defined by the "Fair Labor Standards Act of 1938" includes to suffer or permit to work; that notwithstanding notices posted by the employer in the mill, that ball-mill men and solution men should take one hour for lunch and one of the two men on a shift should relieve the other during his lunch period, and the employees turned in a time card for seven hours for each shift, nevertheless it was the practice of the men to eat their lunches without relief and within sight and hearing of the processes of the mill under their charge without neglecting their work and for which they were responsible and each employee turned in a work report for

each hour of an eight hour shift and which reports were accepted by the employer together with the time and services so rendered including the benefits to the appellee of the presence of each employee as a safety precaution. That the notices instructing the men to take one hour for lunch and one man to relieve the other for lunch only applied to the day shift and no lunch period was designated or provided for, within the afternoon or graveyard shift of eight hours each, and which latter shifts require the same work, services and responsibility; that the employees were not free from duty for a period of one hour during each shift and were available for mishap, accidents, and responsible for the efficient flow of pulp and operation of the machinery. That the place of employment was about 30 miles from the homes of the employees and they could not use an hour's time during a shift even if they had that time and were inclined to do so.

3.

The trial court erred in its finding of fact (No. V, Rec. 29) that each of said appellants was paid in full by appellee at the rate of wages established by agreement between appellants and appellee, which was in excess of that required by the "Fair Labor Standards Act of 1938".

This finding is erroneous for the reason that if there was an express or implied agreement that the appellants should work seven hours per shift and were paid for seven hours and the appellee posted

notices to that effect, but suffered or permitted the appellants to render services for eight hours without compensation for one hour of the eight hour shift that such an agreement was in violation of the spirit and policy of the Act.

4.

The trial court erred in its finding of fact (No. V, Rec. 29) that each of said appellants was paid overtime at the rate of one and one-half times the amount of the agreed wage for all hours worked in excess of forty-two hours a week during the period of employment from January, 1940, to October, 1940, and forty hours from October, 1940, to the termination of the employment of each of the appellants and that each of said appellants was paid overtime at the rate of one and one-half times the agreed wage for all hours worked in excess of forty hours per week.

This finding is erroneous for the reason that each of the appellants was in the employ of the appellee as the term "employ" is used in the "Fair Labor Standards Act of 1938" for one hour for which he was not paid from the time of commencement of employment until April 23, 1942, and the ball-mill men were not compensated for 48 minutes and the solution men for 49 minutes for each shift, from April 23, 1942, until the termination of employment, and that the appellants are entitled to time and one-half for each hour or fraction of an hour that they were in the employ of appellee and for which they were not compensated.

5.

The trial court erred in its finding of fact (No. VI, Rec. 29) that none of the said appellants made any claim for overtime other than that paid by appellee during the period of his employment by appellee and that none of said appellants made any claim for the payment of overtime until the making of demand upon appellee prior to the filing of the action in the present case.

This finding is erroneous for the reason that there is evidence by one of the appellants who was one of the committee representing the mill men which met with the management on April 22, 1941, and who testified that the question of the mill men working eight hours and also the "Fair Labor Standards Act of 1938" was discussed with Mr. Dobson, the manager for the appellee, and while said testimony was slight, no witness for the appellee contradicted such testimony, nor extended, explained or enlightened the court in respect to such testimony. Even if the appellants did not make any claim for the payment of overtime other than what was paid by appellee until prior to the filing of an action in court, such demand was not necessary or required and the appellants could not waive, relinquish, or acquiesce in any agreement or arrangement whereby non-payment of wages for any hours or fraction thereof worked in excess of the maximum number of hours per work week without compensation at the rate of time and

one-half and the appellee could not even in the absence of such a demand withhold such payment of overtime compensation, nor evade, avoid, condone, or take advantage of the employees' failure to make such a demand.

6.

The trial court erred in its finding of fact (No. VII, Rec. 29) that none of the appellants performed any work or labor for appellee during the lunch period or at any other time for which he did not receive pay for overtime at one and one-half times the agreed wage.

This finding is erroneous for the same reason as stated for specifications Nos. 2 and 4.

7.

The trial court erred in its finding of fact (No. VIII, Rec. 30) that the allegations of paragraph IV of appellants' Amended Bill of Complaint are not true; said allegations being in substance and effect, that the appellee employed the appellants in the production of gold and silver ores and reducing the same to precipitates or bullion for interstate commerce and that substantially all of said gold and silver ores, precipitates, and bullion have been produced for interstate commerce and sold, offered for transportation, transported, shipped and delivered in interstate commerce.

This finding is erroneous for the same reason as stated for specification 1.

8.

The trial court erred in its finding of fact (No. VIII, Rec. 30) that the allegations contained in paragraph V of the Amended Bill of Complaint are not true; said allegations being in substance and effect that the appellants rendered services and were required to give their entire time, knowledge and experience to their work and were responsible to the appellee for the proper and careful operation of the machinery and equipment, and for the flow, thickening, separation, sampling and other processes of the ore through the mill for a period of eight hours during each and every day and that said appellants were paid for only seven hours and accordingly each appellant gave his time and services for one hour each day (as modified in paragraph VI) (Rec. 5) without compensation and which hours were in excess of the maximum hours in such work week required by Section 207 of the Act and in violation of said Section 207.

This finding of the trial court is erroneous for the same reason stated for specification 2.

9.

The trial court erred in its finding of fact (No. VIII, Rec. 30) that the allegation contained in paragraph VII of said Amended Bill of Complaint are not true; said allegations being an itemized statement of the period of time each appellant was employed, number of days employed during each period and

rate of wages per day, rate of wages per hour at time and one-half, and total amount claimed due each appellant and which statement was stipulated by counsel for the respective parties to be correct in accordance with appellants' theory of the case.

In the event the findings of the trial court as stated in the foregoing assignments are erroneous, then the finding that the allegations of paragraph VII of said Amended Bill of Complaint are not true would be erroneous for the reason that counsel for the respective parties stipulated that the itemized statements set forth in said paragraph VII (Rec. 6-11) are correct in accordance with appellants' theory of the case.

10.

The trial court erred in making its conclusion of law No. 1 (Rec. 30) that there has been no violation of Sections 6 or 7 of the "Fair Labor Standards Act of 1938", being Title 29 U. S. C. A. Sections 206 and 207, by the appellee.

Conclusion of law No. I, is erroneous for the reasons stated in specification No. 1.

11.

The court erred in its conclusion of law No. II (Rec. 30) that appellants are not entitled to the relief asked for in their Amended Bill of Complaint and that appellee is entitled to judgment herein.

Conclusion of law No. II is erroneous for all of the reasons hereinabove stated.

12.

The trial court erred in its conclusion of law No. III (Rec. 30), that appellee is entitled to recover from appellants its costs incurred in the sum of \$137.68.

Conclusion of law No. III is erroneous for all of the reasons hereinabove stated.

13.

The trial court erred in entering its judgment (Rec. 31) that appellants take nothing by their complaint and that appellee have and recover from the appellants the costs expended in the sum of \$137.68.

The judgment entered by the court is erroneous for the reason it is contrary to the law and evidence.

ARGUMENT.**SUMMARY OF ARGUMENT.**

Appellants have thirteen specifications of errors covering most of the findings, conclusions of law, and judgment of the trial court but for convenience and brevity of the argument, the specifications may be grouped under five separate parts, as follows:

(1) Specifications 1 and 7 cover the findings of the trial court pertaining to the question of the appellants and appellee being engaged in commerce and in the production of goods for commerce during the times that the appellants were in the employ of the appellee.

(2) Specifications 2, 6, 8, and 11 cover the lunch hour period in regard as to whether or not the appellants performed work, labor and services in the appellee's mill for eight hours per shift and for which they only received compensation for seven hours and that the duties and responsibilities of the appellants were the same for the entire eight hours of each shift and in particular for the time that the appellants ate their lunches.

(3) Specifications 3, 4 and 9 relate to the question as to whether or not the appellants were paid in full by the appellee at a rate of wages established by agreement and which rate was one and one-half times the amount of the agreed wage for all hours worked in excess of the maximum number of hours per work week provided for under the "Fair Labor Standards Act of 1938" and that the itemized statement of the appellants alleged in paragraph VII of the Amended Bill of Complaint (Rec. 6) is correct in accordance with the stipulation of counsel for the respective parties covering the employment of each of the appellants.

(4) Specification 5 relates to the question as to whether or not the failure of the appellants to make any claim for overtime other than what was paid by the appellee during the period of employment of appellants until just prior to the filing of the action was an admission by the appellants that they were fully compensated for the full period of their employment and a waiver or relinquishment of any compensation earned by the appellants and unpaid by the appellee

in accordance with the provision of the "Fair Labor Standards Act of 1938."

(5) Specifications 10, 11, 12, and 13 relate to the conclusions of law of the trial court in holding that there were no violations of Section 6 or 7 of the "Fair Labor Standards Act of 1938", being Title 29, U. S. C. A., Section 206-207, by the appellee, and that the appellants are not entitled to any relief asked for in their Amended Bill of Complaint and that the appellee is entitled to judgment together with the appellee's costs.

The appellee, Summit King Mines, Ltd., is a mining corporation engaged in operating a gold and silver mine in Churchill County, Nevada, and operates a mill upon the mining property and reduces the ores by the cyanide process and the gold and silver bullion is shipped and sold to the United States Mint at San Francisco, California; that said mill operated continuously for twenty-four hours per day and all of the appellants were employed in the operation of said mill and their duties and responsibilities were in general to keep the ore and pulp flowing through the mill by the continuous operation of the machinery and equipment and taking samples and other duties of a routine nature.

There is considerable distinction between the employment of men engaged in performing work and services in a mill or plant operating continuously, than there is in mining, construction, manufacturing and other industries, for the reason that such a mill as was operated by the appellee for twenty-four hours

per day must be kept running continuously, as it would not be practical or economical to arrange for the employment of the operators of the mill except by dividing the twenty-four hour day into three shifts and which would require the attendance of the employees during the entire period of eight hours without arranging the time so that the employees might have a definite period apart from their work and responsibilities for lunch, while on the other hand, in mining, construction, manufacturing and other industries which are generally not operated continuously during twenty-four hours per day, the employer may arrange the time so that the men will have a period for work, and a period for lunch can be set aside during which the men can be relieved of their duties and responsibilities without loss of time or of benefits to the employer. We believe that the application of the "Fair Labor Standards Act of 1938" to the employment of the appellants by the appellee under the definition of the term "employ" meaning to "suffer or permit to work", covers the employment of the appellants for each and every hour of an eight hour shift, regardless of whether their work was manual or consisted of being present upon the premises of the appellee and assuming the responsibilities for each hour from commencing work until relieved at the end of a shift.

Such portions of the "Fair Labor Standards Act of 1938" as, we believe, are applicable to the case at bar reads as follows:

FAIR LABOR STANDARDS ACT OF 1938.

We will only cite such portions of the "Fair Labor Standards Act of 1938" as may be applicable to the case at bar.

Section 201. Short title.

Sections 201-219 of this title (29 U. S. C. A.) may be cited as the "Fair Labor Standards Act of 1938". June 25, 1938, c. 676, Sec. 1, 52 Stat. 1060.

Section 202. Congressional finding and declaration of policy.

(a) "The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintainance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of Sections 201-219 of this title, through the exercise by Congress of its power to regulate commerce among the several states, to correct and as rapidly as practicable to eliminate the con-

ditions above referred to in such industries without substantially curtailing employment or earning power." June 25, 1938, c. 676, Sec. 2, 52 Stat. 1060.

Sec. 203. Definitions.

As used in Sections 201-219 of this title:

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

"(g) 'Employ' includes to suffer or permit to work."

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Sec. 207. Maximum hours.

"(a) 'No employer shall, except as otherwise provided in this section, employ any of his em-

ployees who is engaged in commerce or in the production of goods for commerce:

“(1) For a work week longer than forty-four hours during the first year from the effective date of this section;

(2) For a work week longer than forty-two hours during the second year from such date, or

(3) For a work week longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified, at a rate not less than one and one-half times the regular rate at which he is employed.” ’ ’ ’

Section 216. Subdivision (B) reads as follows:

“Any employer who violates the provisions of Sec. 206 or Sec. 207 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.” June 25, 1938, c. 676, Sec. 16, 52 Chap. 1069.

When the mill started operating in January, 1940, the maximum weekly hours provided for in the Act were forty-two hours and which continued until October 24, 1940; that from and after October 24, 1940, the maximum number of weekly hours provided in the Act were forty hours.

“Section 203, Subdivision (G) defines the term ‘employ’ as follows. (G) ‘Employ’ includes to suffer or permit to work.”

We believe the term in Section 203, Subdivision (G) “to suffer or permit” excludes the rules of law applicable to contracts for work and service and which the trial Judge evidently had in mind when deciding the case. To suffer or permit would imply the acceptance of the time, services, and attention to their duties, of the employees and the obligation on the part of the employer to compensate them for the same.

Congress must have intended to draw that distinction to avoid any attempt on the part of the employer and employees to resort to any evasion or subterfuge in the enforcement of the Act.

1.

APPELLANTS DURING THEIR EMPLOYMENT BY APPELLEE WERE ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE AND WHICH WERE TRANSPORTED IN INTER-STATE COMMERCE.

Counsel for the respective parties stipulated before trial (Rec. 15) that the appellee produced gold and

silver ores in Churchill County, Nevada, and which were there reduced to bullion and shipped by United States Mail to the United States Mint at San Francisco, California, where it was sold by the appellee.

The Circuit Court of Appeals, Fourth Circuit, in the recent case of *Walling Adm'r of Wage and Hour Division, United States Department of Labor v. Haile Gold Mines, Inc.* (36 Fed. (2d) 102), May 28, 1943, held:

“The term ‘goods’, as used in the Fair Labor Standards Act regulating wages and hours of employees engaged in producing goods for commerce, includes gold mined for the government and shipped to a mint in another state, since, under the Gold Reserve Act, gold may be used for industrial, professional, and artistic purposes.” Fair Labor Standards Act of 1938, 29 U.S.C.A. Sec. 203(i); Gold Reserve Act of 1934, Sec. 3, 31 U.S.C.A. Sec. 442, 1942 Cumulative Annual Pocket Part.

“Where the Post Office transporting gold to the United States Mint in another state was not the agent of the mint and the gold did not become the property of the government until it had arrived, was receipted for, inspected, and paid for, the business conducted by mine operator constituted ‘interstate commerce’ within the ‘Fair Labor Standards Act’ and was not a mere administrative act of the government, even though such shipments were pursuant to orders of the government.” Fair Labor Standards Act of 1938, Sec. 203, 29 U.S.C.A. Sec. 203(b,i,j,); Gold Reserve Act of 1934, Sec. 3, 31 U.S.C.A. Sec. 442.

“The Fair Labor Standards Act was applicable to employees engaged in mining gold for the government even though there was no competitive market for gold in interstate commerce, since the power of exclusion from interstate commerce does not depend on the commercial nature of the article or the existence of competition.” Fair Labor Standards Act of 1938, 29 U.S.C.A. Sec. 203(b,i,j); Gold Reserve Act of 1934, Sec. 3, 31 U.S.C.A. Sec. 442; U.S.C.A. Const. Amendments. 5, 10.

The Circuit Court of Appeals, Eighth Circuit, on June 30, 1942, in the case of *Canyon Corporation v. National Labor Relations Board*, 128 Fed. (2d) 953, also held that gold produced and shipped from one state to another and sold to the United States Mint in “commerce” and “affected commerce” within the National Labor Relations Act. The syllabus of said case reads as follows:

“The production and shipment of gold bullion by a mine and refinery in one state for purpose of selling it to a United States Mint in another state is ‘commerce’ within the National Labor Relations Act, even though the United States may be the only customer to which bullion can be legally sold.” National Labor Relations Act, Sec. 2 (6), 29 U.S.C.A. Sec. 152 (6); Gold Reserve Act of 1934, Sec. 1 et seq., Sec. 3, 31 U.S.C.A. Sec. 440 et seq., Sec. 442.

“That part of Sec. 3 of the Gold Reserve Act, 31 U.S.C.A. Sec. 442, 1942 Cumulative Annual Pocket Part page 67, reads in part as follows: ‘The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of

the President, prescribe the condition under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use: * * *”

The Secretary of the Treasury with the approval of the President, has practically the same authority for the sale of silver at home and abroad. Sec. 734b, Title 31 U.S.C.A., page 117, 1942 Cumulative Annual Pocket Part, reads as follows:

“Whenever and so long as the market price of silver exceeds its monetary value or the monetary value of the stocks of silver is greater than 25 per centum of the monetary value of the stocks of gold and silver, the Secretary of the Treasury may, with the approval of the President and subject to the provisions of section 405a of this title, sell any silver acquired under the authority of sections 311a, 316a, 316b, 405a, 448-448e, 734a, and 734b of this title at home or abroad, for present or future delivery, at such rates, at such times, and upon such terms and conditions as he may deem reasonable and most advantageous to the public interest.” (June 19, 1934, c. 674, Sec. 4, 48 Stat. 1178.)

2.

EACH OF THE APPELLANTS PERFORMED WORK, LABOR AND SERVICE FOR EIGHT HOURS DURING EACH SHIFT AND WHATEVER TIME APPELLANTS TOOK FOR EATING THEIR LUNCHESES WAS IN CLOSE PROXIMITY TO THEIR WORK WHERE THEY COULD OBSERVE THE MACHINERY AND EQUIPMENT AND THE FLOW OF ORE OR PULP AND WERE RESPONSIBLE FOR THE PROPER PERFORMANCE OF THEIR WORK AND CONTINUOUS OPERATION OF THE MILL AND THE APPELLEE SUFFERED AND PERMITTED APPELLANTS TO RENDER SUCH SERVICES AND WITHOUT COMPENSATION FOR ONE HOUR PRIOR TO APRIL 22, 1941, AND 48 MINUTES FOR THE BALL-MILL MEN AND 49 MINUTES FOR THE SOLUTION MEN AFTER SAID DATE AND UNTIL TERMINATION OF EMPLOYMENT.

There is some conflict between the evidence of the appellants and witnesses for the appellee in regard to the time taken by the men in eating their lunches and as to the place and time of doing so. It seems that the place and time of eating lunches was left entirely to the men themselves and without any direction or restraint by the management other than what was contained in the Notices dated December 29, 1939, and April 23, 1941 (Rec. 64 and 67). It appears that the management reposed confidence in the men to eat their lunches at such times and places as would not interfere with or cause neglect of their duties.

Some of the evidence of the appellants and witnesses for the appellee are hereafter quoted from the transcript of the testimony as being typical and illustrative of the routine practice of the mill men in the employ of the appellee.

Mr. Fox, in his direct testimony, testified as follows (Rec. 55-57):

Q. Did it make any difference in the time which you took for lunch?

A. No.

Q. Was there ever any time during the course of your employment when you were able to take an hour away from your work?

A. No. (Rec. 56)

Q. Was there any time during the course of your employment that you were able to take 45 minutes away from your work?

A. Not and do justice to your work.

Q. Was there any time during the course of your employment that you were able to take a half hour away from your attention to your work while in the employ of the company?

A. Well, I would say not.

Q. Was there any time that you could take any time away from attention to your work?

A. No. You had to have your mind on the mill all the time.

Q. Where did you eat your lunch generally?

A. Most of the time in the mill.

Q. And that was in close proximity to your work, wasn't it?

A. Yes. It was, you might say, in the middle of it.

Q. Did that interfere with your mill work in any way?

A. Eating lunch?

Q. Yes.

A. Well, at times something would come up that would have to be attended to and you would quit, if you were eating lunch, you would quit eating lunch and go and attend to whatever it was.

Q. Was it possible for you to be parked any distance from the mill during any period of the eight hour shift and give your attention to the mill?

A. No.

Q. Was your attention to your work services continuous during the entire eight hour period?

A. It was, from the time you come on shift and relieve the other shift ahead of you, you were responsible for your work in the mill for the full eight hours.

Mr. Childers testified as follows (Rec. 105-106):

Q. Did you ever have any definite period off for lunch on any shift?

A. No.

Q. How did you eat your lunch?

A. Well, I usually had it where I could see most of the mill.

Q. How much time would you take?

A. Well, I never timed myself; I couldn't tell you just exactly. It doesn't take me very long to eat.

Q. Were you ever interrupted from eating your lunch?

A. Yes.

Q. How often would you say?

A. Several times. I couldn't tell the number of times.

Q. Was it a practice for one man to relieve the other man in operation of a shift?

A. No.

Warren S. Morden also testified in substance (Rec. 125-127):

Q. When would you eat your lunch on the day shift?

A. Well, that would vary. You see, when I first went to work there, everything was in pretty much of a turmoil, new mill just starting off and things were upside down, quite a number of things had to be ironed out, and we ate lunch when we got time. Lots of times we didn't get time to eat lunch at all. My partner went without lunch a number of times but I generally got a sandwich. That was when we first started; trying to get lime up and put in a ton of lime a shift or possibly more, and had to slack this lime and pack it up in the buckets and take care of the mill operation too.

Q. How long did you work on day shift; that is, how much time did you put in the mill on day shift?

A. You mean my average working time on shift?

Q. Yes.

A. Well, I was generally on my toes the full shift. I wouldn't say that I was always in a hurry after the mill was organized and running half way properly. There was more leisure time afterwards, but on the start we were on our toes, you might say, from the time we went on until the time we went off.

Q. When would you eat your lunch on the afternoon shift?

A. Well, most any time.

Q. Where would you eat it?

A. Well, I generally ate my lunch right alongside the classifier up by the mill.

Q. And on the graveyard shift, when did you eat your lunch?

A. Well, I ate that generally after I made my first round.

Q. Was there any time during your employment there that you took an hour for lunch or an hour for yourself?

A. No.

Q. Was there any time that you took three-quarters of an hour for lunch or for yourself?

A. Well, there might have been times when it would be three-quarters of an hour before I completed my lunch.

Q. Was that all taken up in eating of your lunch?

A. No sir. It was interrupted by some adjustment to be made or something to be attended to.

Q. Was there any time during your employment that you took as much as half an hour wholly for eating of your lunch?

A. No, it generally took me around 15 to 20 minutes to eat my lunch.

Q. Were you in a place where you could observe your work and what was going on during that time that you were eating your lunch?

A. Yes, I generally eat where I could observe the operation.

Q. How many hours did you put in during the afternoon shift on the solution or ball-mill?

A. You mean actual time working?

Q. Yes.

A. Well, it would be eight hours.

Q. And on the graveyard shift?

A. The same.

The evidence of the witnesses for the appellee is very vague and indefinite as to the time taken by the

various appellants for the eating of their lunches. Mr. Dobson, the manager and a witness for the appellee, estimates the time variously from about half an hour to longer periods but admits that he only went out to the mill two or three times a week, arriving there slightly before the lunch period and spending only from 45 minutes to two hours in the mill and that he did not visit the mill during the afternoon or graveyard shifts and hence his knowledge of the time taken by the men for lunch or for any other period would not be for any definite or constant period.

Upon cross-examination, a portion of his testimony is as follows (Rec. 164):

Q. You testified you observed several of these men taking approximately half an hour for lunch. Will you state what they did with the other half hour during the same hour?

A. Well, I can't recall what they did. I don't know whether they attended to their duties or talked or what they did. I presume they probably looked after some of their duties part of the time.

Again, Mr. Dobson testified in answer to a question by the Court (Rec. 167):

Q. During the hours that they were supposed to be employed, were they supposed to be on duty during those hours at all times, unless some special reason called them away?

A. They were supposed to be on duty, yes.

The testimony of Mr. Clawson, Superintendent of the mill, and a witness for the appellee, was also very uncertain as to the time taken by appellants in eating their lunches. He testified on his direct examination relative to the practice of Mr. Fox in eating lunch partially as follows (Rec. 193):

Q. Do you know what Mr. Fox's practice was in eating lunch?

A. His practice generally was that he ate lunch either outside the little office or inside on the bench I used for my records.

Q. Do you know how much time he consumed in eating lunch?

A. I couldn't say positively how much time he used.

Q. What was Mr. Sutton's practice in regard to lunch? (Rec. 195, 196.)

A. Mr. Sutton's practice in regard to lunch, Mr. Sutton was a very very attentive man to his mill. The fact is, the man seldom spoke. He didn't trust practically anybody to do his work. I think that included Mr. Fox as well as the other helpers.

Q. What was his practice with regard to lunch?

A. Well, his practice was to eat his lunch on the steps leading from the primary thickener floor or office floor up to the agitators, that was his general rule. Sometimes he did eat in the little office.

Q. About how long did he consume as a lunch period?

A. I would say he took anywhere from 15 to 20 minutes.

Q. And what did he do at the end of his lunch period?

A. As a rule Mr. Sutton always got up and began to move around. What he done absolutely I couldn't say because——

The reporter evidently did not get the remainder of the sentence.

Mr. Clawson also testified in regard to the practice of Merrill C. Hutchins (Rec. 199):

Q. And Merrill C. Hutchins, what was his practice?

A. Merrill C. Hutchins, I can't say I ever saw him out of the mill when he took his noon hour off. He sat around. The time was to be taken when most convenient for them; it was left up to them.

Q. How long did Mr. Hutchins consume eating lunch?

A. I would say actually eating his lunch probably 15 to 20 minutes.

The testimony of Mr. Clawson, the mill superintendent, relative to the time taken by the other plaintiffs in eating their lunches and what they did afterwards was more or less to the same effect, that they probably took from 15 to 20 minutes and sometimes more and that they would sometimes sit around for an additional period of time.

Mr. Clawson also testified in his cross-examination (Rec. 212):

Q. And isn't it customary for all mill men to get paid for eight hour shifts, including the time they take out for lunch?

A. Up until the time of the wage and hour act, but almost all mills are working less than eight hours now.

Q. The wage and hour law has had considerable effect in changing the practice of employment of men, has it not?

A. It has.

Q. And particularly in cutting down overtime hours, isn't that correct?

A. Well, yes, it does cut down overtime in this particular respect—if you work them the straight hours, they naturally would be getting an hour every day overtime.

There is also testimony brought out from Mr. Clawson, the mill superintendent, on his cross-examination in support of the appellants' contention that they were in the employ of the appellee for eight-hour shifts (Rec. 214):

Q. Were most of the men within the mill for the eight hour periods of each shift?

A. They were in or around the mill, yes.

Q. And they were available, within call, if you needed them at any time?

A. I can't say to that because one man in particular, I hunted him over an hour and couldn't find him and we had a very small mill.

Q. Speaking about the mill men, were they not available to your call?

A. Most every man was within calling distance, yes. Outside of one or two men, practically

every man spent his time in the mill, even his leisure time.

Q. And they were in the mill even during what you call leisure time?

A. Yes, or there during most of it.

Q. And subject to your call or the foreman's, or anybody else's call who was there?

A. There was only one man in authority in that mill after I took charge and that was myself. I directed all the men myself.

Q. And you controlled the discipline of the mill?

A. That was my duties.

The appellee has attempted to show by its witnesses that the appellants spent a half hour or more in taking a shower and changing their clothes in the change-room, but which evidence is also very indefinite and there has been no showing on the part of the appellee that such time was to be deducted or could be deducted from appellants' wages or periods of employment. If the men took time to take a shower or change their clothes, it was during the latter part of their shift and before leaving their places of employment and hence could not be connected in any way with the lunch period for which time was deducted in the manner stated in the rules posted on December 29, 1939, and April 22, 1941.

If the manager and the superintendent knew of such practice, and had any objection to it, then they could easily have put a stop to that practice or discharged such employees if they were doing so on company time, for neglecting their duties.

The witnesses for the appellee have attempted to show that the appellants were in the habit of reading while on shift, but the time of reading seems to be spread over the entire eight-hour shift.

At least all three plaintiffs testified that they were required to take samples and make tests over the entire eight-hour shifts. The evidence, as a whole, shows that the work of a mill man, including both ball-mill man and solution man, is not laborious and with very little manual labor connected with it except on occasions and that during most of the time, with the exception of the routine of taking sample tests and so forth, that his duties consist of watching the mechanical contrivances and machinery and the flow of ore or pulp in order to see if anything goes wrong, and if it does, to correct it as soon as possible. This is shown rather positively by the evidence of Mr. Clawson, the mill superintendent, who testified in his cross-examination, in part as follows (Rec. 220):

Q. Doesn't the greatest part of the mill man's duty lie in observation and hearing?

A. A great per cent of it. That is, I wouldn't say a great per cent, I shouldn't say that—I would say one-third of it.

Q. Isn't the efficiency of the mill man determined a great deal by his ability to keep the mill running smoothly? (Rec. 221.)

A. Yes, sir.

Q. And if he does keep it running smoothly, he doesn't have to use his hands very much?

A. Not a great deal. As I testified, he doesn't spend a great deal of time, it can be done in as little as ten minutes.

Q. In other words, some mill men don't need to put in actual working time only a very small portion of their time?

A. There is a great deal of difference in the individual.

Q. And a mill man's sense of hearing goes a long way with a ball-mill man, does it not?

A. Sense of hearing and sight.

Q. And sight together?

A. Both.

Q. So that a mill man does not use his hands like a miner does?

A. No; mill men are really semi-skilled labor, or you might even call them skilled labor.

Q. And that is the principal part of the schedule, in keeping the mill operating as smoothly as he can?

A. Exactly, that is why they usually get more money.

Q. And very frequently in a mill there are things that go wrong very suddenly and very unexpectedly, isn't that true?

A. It can happen.

Q. And it does happen very often?

A. No, I wouldn't say very often. I would say very seldom.

Q. And on such occasions a man must act quickly and promptly in handling his work?

A. He should. They do not always do it.

Q. And for that reason a man generally keeps in close proximity to his work, so he can see or hear if anything goes wrong?

A. He should.

Q. And for that reason men are kept usually in the mill during the period of their eating lunch?

A. One man; I should say there should be one man in the plant.

3.

THERE IS EVIDENCE THAT THE APPELLANTS MADE CLAIM FOR OVERTIME PRIOR TO THE DEMAND MADE JUST BEFORE FILING OF ACTION: EVEN IF NO DEMAND WAS MADE THE APPELLEE WAS REQUIRED TO PAY FULL COMPENSATION UNDER THE ACT FOR ALL HOURS THE APPELLANTS WERE IN THE EMPLOY OF THE APPELLEE.

The conference between a committee of miners and millmen, upon which H. M. Childers, one of the appellants, represented the mill men, with Mr. Dobson, manager for the appellee, brought out the fact that the mill men were working eight hours a shift and being paid for only seven.

The work reports of the appellants will show that the appellants accounted for eight hours per shift and that the appellants followed the same routine for each of the eight hours. Such reports put the appellee on notice every day that the appellee was suffering, permitting, and accepting the services of the appellants for eight hours during each shift.

The notice to mill employees, dated April 22, 1941 (Rec. 64), did not seem to make any material difference in the working time of the mill men and only applies to a raise in wages of approximately 25 cents per day, or \$1.50 per week. It may be noted, however, in this connection, that at the time a committee of the miners and Mr. Childers, representing the mill men, had a conference with Mr. Dobson, the manager, Mr. Childers brought up the subject of the mill men working eight hours and being only paid for seven hours and also the "Fair Labor Standards Act of 1938" but Mr. Childers was unable to give the sub-

stance of the reply of the manager, but he did testify in part as follows (Rec. 98-99) :

Q. At that conference, was there anything mentioned about a seven hour day or seven hour shift?

A. Yes.

Q. What was it?

A. I mentioned the fact that we were working out there eight hours.

Q. And to whom?

A. Mr. Dobson.

Q. What was his reply, if any?

A. I can't remember the exact reply, but as I remember it, he gave me a lot of figures on how the mill wasn't making any money and that they would have to shut down if they had to pay the raise.

Q. Was there anything said at that time about fair wages standard act?

A. Yes; I can't recollect what it was.

Mr. Dobson, the manager, failed to contradict Mr. Childers' testimony in respect to the above matter and failed to give any explanation as to just what was said in regard to the point made by Mr. Childers that the mill men were not being paid their full time.

4.

THE CONCLUSIONS OF LAW FILED AND JUDGMENT ENTERED BY THE TRIAL COURT ARE NOT SUPPORTED BY THE LAW AND THE EVIDENCE; BUT ON THE CONTRARY THE TRIAL COURT SHOULD HAVE ARRIVED AT CONCLUSIONS OF LAW THAT APPELLANTS AND APPELLEE WERE ENGAGED IN COMMERCE AND PRODUCING GOODS FOR COMMERCE AND THAT APPELLANTS WERE IN THE EMPLOY OF THE APPELLEE FOR EIGHT HOURS DURING EACH SHIFT AND ENTITLED TO COMPENSATION FOR ADDITIONAL TIME.

There is considerable conflict in the evidence as to the manner and reasons for making out time cards and the inconsistency of the hours marked on the time cards and the actual time which the appellants claim to have given their services during an eight-hour shift. The testimony of Mr. Childers is typical of the practice in respect to making out their time cards at the end of a shift (Rec. 102):

Q. When you went to work in the mill there, how did you make your time card out as to the number of hours?

A. I marked seven hours.

Q. Why?

A. That was my instructions.

Q. From whom?

A. From the solution man I worked with. When I went to work in the mill I worked in with a man by the name of O'Neill. He gave me the rules I had to observe and one of them was to mark seven hours on my time card.

Mr. Dobson, the general manager, was the only one present at the trial who could have contradicted Mr. Childers or corrected him as to the reason for

the change in marking time cards and he failed to do so.

Prior to the commencement of the operation of the mill, the appellee, on December 29, 1939, posted a notice in the mill designated "Attention Mill Men" and which is defendant's Exhibit B (Rec. 67), the first three paragraphs of which read as follows:

1. The solution man on shift will be in charge of the mill and will be responsible for same.

2. Men will work seven hour shifts, relieving each other one hour for lunch. For example: the ball-mill operator will relieve the solution man from 11:00 to 12:00 and the solution man will relieve the ball-mill man from 12:00 to 1:00. The operator relieving will be responsible for the other operator's work as well as his own. This applies except in the case of emergency, when other relieving hours can be arranged.

3. Time cards will be filled out for each man on shift and signed by the solution man. He will then turn them into the mill office.

The designation of the time for relieving one of the men on shift by the other is somewhat ambiguous. It might indicate that the lunch period between 11 o'clock and 12 o'clock might apply only to the day shift or it might be simply illustrative for the three shifts but, inasmuch as the graveyard shift was from 11 p. m. to 7 a. m., then it must be apparent that the appellee expected the time and services of the appellants for the entire eight hours. If such was not the intention of the appellee then the appellants on the

graveyard shift should not have been required to report for work until one hour later when the appellants could have the benefit of that one-hour period before reporting for work.

After the conference of the committee of miners and mill men with the management on April 22, 1941, a notice was posted dated April 23, 1941, defendant's Exhibit A (Rec. 64), entitled "Notice to Mill Employees on Daily Wage Basis," wherein the solution men were notified that their shift, including the lunch period, would be eight hours as it always had been but instead of taking one hour for lunch they were to take forty-nine minutes but to mark their cards seven hours plus eleven minutes overtime which would result in an increase of \$1.50 per week.

The ball-mill men were similarly instructed with one minute difference in the time worked and resulting in the same increase of \$1.50 per week.

The testimony of the appellants testifying was that there was no change made in their working time or routine and their only benefit was an increase in their wages amounting to \$1.50 per week.

There is no evidence in the record that the appellee insisted upon or even required a compliance with the above notices in respect to one man relieving the other or taking of a specific time for lunch.

The appellee posted the notices but suffered and permitted the men to devote their time and services for the entire eight hours and acquiesced and consented to the men eating their lunches when they

desired or their work afforded them an opportunity to do so.

The work report cards turned in by the appellants shows that the appellants were responsible for every hour of the eight-hour shift including the time they might spend in eating their lunches.

In the very recent case of *Walling v. Dunbar Transfer and Storage Company, Inc.*, a District Court case, Western District of Tennessee, reported in 6 Wage and Hour Reports 476 (at this writing not reported in Advance Sheets), the trial Court found that the officials of the transfer and storage company had given employees instructions that when they were on assignments they were responsible for defendant's trucks and their cargoes and that they were not to stop or leave the trucks for personal purposes. In some instances, men having their lunches with them ate while delivering or waiting at a customer's place of business and in other instances employees had no lunches nor took any time off for lunch but nevertheless were docked on some occasions for thirty minutes for lunch and on other occasions for one hour, depending on the length of the assignment. The trial Court in its Conclusions of Law expresses the views of the writer more explicitly and which reads as follows:

"IV. The hours for which employees must be compensated at the standards prescribed in the Act include not only the hours that employees were actually engaged in specific assignments,

but also such hours as they are permitted by their employer to remain on or near their employer's premises subject to call. Therefore, defendant's drivers and helpers should have been compensated for the time spent in waiting about the premises for an assignment, as well as time spent in traveling from defendant's place of business to freight terminals and waiting for an opportunity to load defendant's trucks. Failure of defendant to show on its records such time spent by its employees resulted in violations of Sections 11(c) and 15(a) (5) of the Act and failure to compensate them for such hours resulted in violations of Sections 6 and 15(a) (2) of the Act.

V. Defendant's failure to compensate its employees for lunch periods when they were on duty during such periods resulted in violations of Sections 6 and 15(a) (2) of the Act (Sections 206, 215(a) (2) 29 U.S.C.A.) and its failure to show on its records such time spent by employees resulted in violations of Sections 11(c) and 15(a) (5) of said Act. It is immaterial that in some instances employees have eaten their lunches while driving, riding, or waiting for an opportunity to load or unload defendant's trucks.

We realize that there is considerable diversity in the operation of different industries and the most of which are carried on during the day time when the hours of work can be arranged to provide for a lunch period by the complete stoppage of work while all the employees eat at the same time.

It is much different in other industries which must operate for twenty-four hours per day without interruption. Such are quartz mills, reduction works, smelters, steel mills, oil drilling, railroading, shipping, and many others. In the mining industry it is generally necessary to suspend mining operations while the miners eat their lunches as their labor generally consists in working with their hands, while in the mills, smelters, and other reduction works, the processes are generally mechanical or chemical and must be watched continuously.

Oil well drilling is very similar to operating an ore mill inasmuch as the drilling is continued for twenty-four hours a day, which is usually divided into three shifts of eight hours each and the greater part of the time the drill is operating, the men stand around watching the operation and can generally tell from observation and feeling the cable whether or not the drilling is proceeding properly.

“For the purpose of determining overtime compensation due to oil pumpers of defendant in accordance with the Act, there should be included as hours worked by such pumpers not only the hours that such pumpers were actually engaged in manual labor, but also such hours as they were charged by the terms of the understanding between them and the defendant with substantial responsibility for the successful operating of the pumps under their charge; and including also the periods during which they were obliged to remain on or near the premises to enable them to carry such responsibility properly.” *Fleming v. Rex Oil and Gas Co.*, 43 Fed. Supp. 950, 951;

Missouri K. & T. Ry. Co. v. United States, 231 U. S. 112, 34 S. Ct. 26, 58 L. Ed. 144.

The District Court for the Western District of Kentucky has construed the minimum wage section of the Act to include time when employee was required to be on the job was just as much "employment" as actual labor.

"In determining amount of wages motorbus driver was entitled to under the Fair Labor Standards Act, the waiting periods between trips should be included in the total number of hours driver was employed, where driver was expected to be on the job during such periods which were not long enough to permit him to go elsewhere or to engage in other activities." *Travis v. Ray*, 41 Fed.Supp. 6.

The appellee evidently relies to a great extent upon the appellants taking advantage of the company's time in loafing with their lunch boxes open, reading on shift and taking showers before the shift was ended but in that respect, we must contend that the employees were, at all times, under the control of the mill superintendent and such practices, if indulged in, could have been restricted or prohibited.

"It is pointed out that an essential characteristic of the relationship of employer and employee is that the former retains the right to control and direct the individual who performs the services, both as to the results to be accomplished by the work, and as to the details and means by which that result is accomplished. Undoubtedly, this proposition generally is sound and sustained by the authorities." *Carroll v. Social Security Board*, 128 Fed. (2d) 876, 878.

The notices posted in the mill attempting to regulate the hours of employment and periods of unemployment, even if agreed upon or acquiesced in by the appellants, if in contravention of the Act, did not discharge or release the appellee from its obligation to pay the appellants for the full time they were in the employ of the appellee within the meaning of the Act, for the reason that Congress has declared the Fair Labor Standards Act to be for the public benefit and the courts, by numerous decisions, have declared that the employer and employee may not, by any agreement, evasion or subterfuge, avoid compliance with the Act.

Even if the appellants were willing to waive any rights which they might have under the Act or if the appellee made some arrangement whereby the appellee secured services from the appellants and they acquiesced in such an arrangement, that the same would not be binding.

“Overtime pay probably will not solve all problems of overtime work, but Congress may properly use it to lessen the irritations. Substandard labor conditions were deemed by Congress to be ‘injurious to the commerce and to the states from and to which the commerce flows’. To protect that commerce from the consequences of production of goods under sub-standard conditions it may choose means reasonably adapted to these ends, including regulation of intra-state activities, by minimum wage and maximum hour requirements.”

“If overtime pay may have this effect upon commerce, private transactions made before or after

the passage of legislation regulating overtime can not take the overtime transactions 'from the reach of dominant constitutional power.' "

"If, in the judgment of Congress, time and a half for overtime has a substantial effect on these conditions it lies with Congress' power to use it to promote the employees' well-being".

Overnight Transport v. Missel, 316 U. S. 572, 86 L. Ed. 1682, 1687, 126 F. (2d) 98.

The failure of the appellants to demand pay for the hour deducted is not a waiver of their legal rights under the provisions of the Act.

"Defendants concede that an agreement, in advance of employment, to accept less than permitted by law would render nugatory the objectives of the Act. We think precisely the same result would follow if the employer, by agreement with its employees, be permitted to pay less than the Act prescribes. Waivers in advance of employment are no different in substance or effect than waiver of back pay for past employment. In both situations, the employers pay and the employees receive less than the statutory requirements and the purposes of the legislation ignored."

U. S. v. Warshawsky, 123 Fed. (2d) 622, 626.

Even if the appellee arranged the hours of work in such a way as to circumvent the purposes of the Act, the appellee would not be permitted to take any advantage of the appellants in that respect.

"Here the right asserted by the Board is not one arising upon or derived from the contracts be-

tween the petitioner and its employees. The Board asserts a public right invested in it as a public body charged in the public interest with the duty of preventing unfair labor practices. The public right and the duty extend not only to the prevention of unfair labor practices by the employer in the future but to the prevention of his enjoyment of any advantage which he has gained by violation of the Act, whether it be a company union or an unlawful contract with employees as a means of defeating the statutory policy and purpose. Obviously, employers can not set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which interposes or by insisting more than in a private litigation that the employers' obedience to the Act can not be compelled in the absence of the workers who have thus renounced their rights." *National Licorice Company v. N.L.R.B.*, 309 U.S. 350, 364; 84 L. Ed. 799, 810.

The marking of the time cards, or the acceptance of checks as payment for less hours than what the appellants were entitled to would not be regarded as satisfaction and full compensation under the Act.

"Indorsement of checks acknowledging payment in full of all wages, by laborers performing work for city contractors, did not constitute accord and satisfaction so as to preclude laborers from suing contractors for balance of wages where wage rate was set by city ordinance and public policy of municipality was involved." *Gabel v. Elliott*, 35 Pac. (2d) 44.

CONCLUSION.

There is no question or conflict in the evidence that the mill operated twenty-four hours per day which was divided into three shifts of eight hours each and that each of the appellants were upon the appellee's premises for eight hours during each shift. If one of the appellants was relieved one hour for lunch, then the appellee was dispensing with the services of six men for one hour or a total of six man hours during each twenty-four hour day.

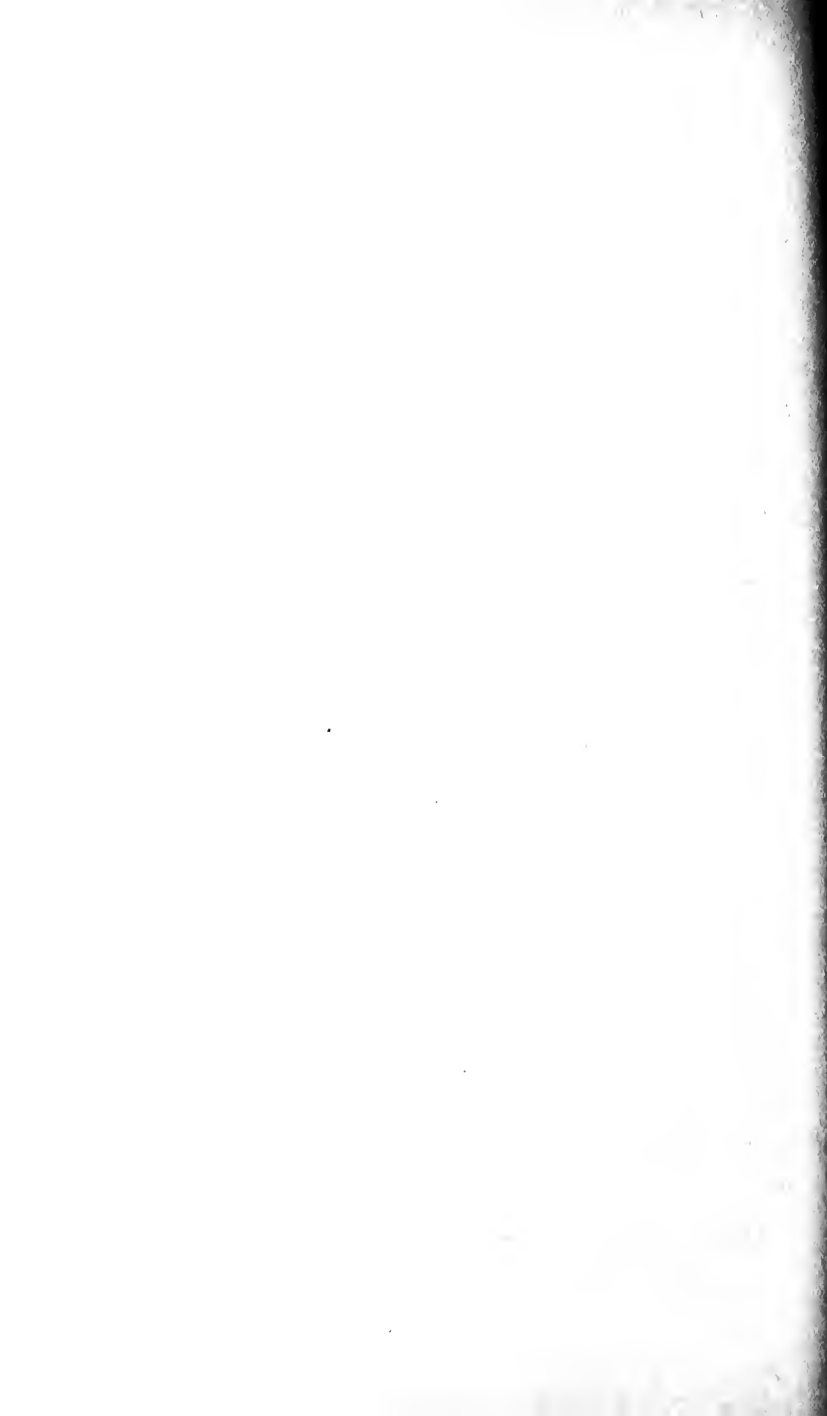
If such an arrangement was economical and satisfactory, then it is obvious that the mill could have been operated just as economically and satisfactorily by one man per shift for the entire twenty-four hour day.

We assume that the tonnage of ore through the mill and the saving of the values were practically the same for each hour of the day and therefore, it is obvious that the appellee was unnecessarily paying for wages for eighteen man hours per day, or else, was securing the services of the appellants for six hours per day without compensation.

The overtime wages for eleven and twelve minutes per day were for the purpose of increasing the wages \$1.50 per week, which was received by the appellants and included in the computation of wages which we claim were earned and unpaid.

Dated, Reno, Nevada,
October 6, 1943.

MARTIN J. SCANLAN,
Attorney for Appellants.



No. 10526

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

AL C. FOX, ET AL., APPELLANTS

v.

**SUMMIT KING MINES, LIMITED, A CORPORATION,
APPELLEE**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEVADA**

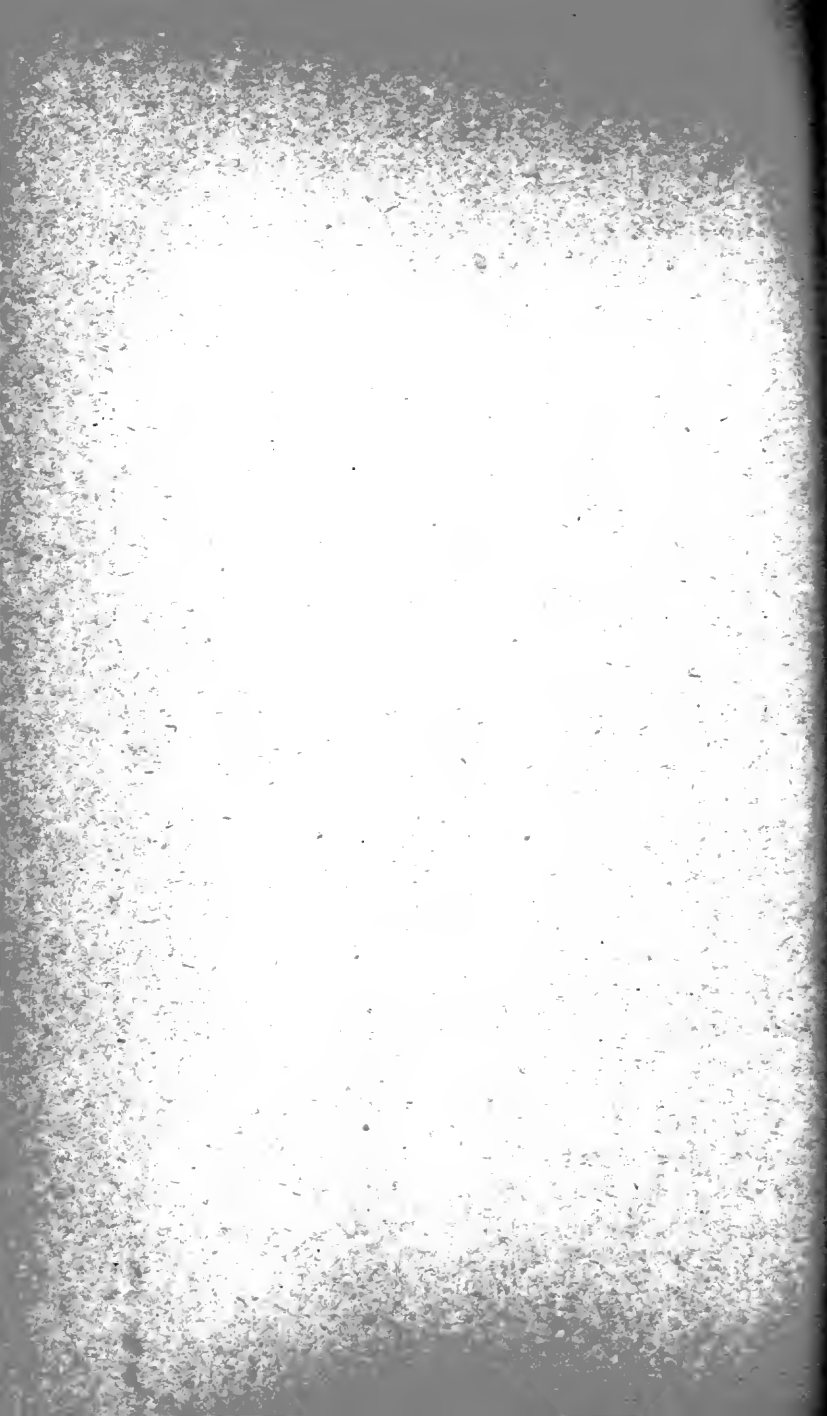
**BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR
DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS
AMICUS CURIAE**

FILED

OCT 11 1943

**PAUL P. O'BRIEN,
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BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR
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AMICUS CURIAE

The Administrator of the Wage and Hour Division, United States Department of Labor, is charged with the duty and responsibility of administering the Fair Labor Standards Act. Because this case presents significant questions of interpretation of that Act, the Administrator, by leave of Court, submits this brief as *amicus curiae*.

STATEMENT

This is an appeal from a final judgment of the District Court of the United States for the District of Nevada dismissing, after trial, appellants' suit

for unpaid overtime compensation, an additional equal amount as liquidated damages, and attorneys' fees. The suits were instituted pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201.

STATEMENT OF THE CASE

The Court found that appellee produced gold and silver ores in Nevada where they were reduced to bullion and then shipped by appellee through the United States mail to the United States Mint at San Francisco, California (R. 28). Appellants were employed in appellee's mill or reduction works in the production of the ores or their reduction to precipitates or bullion (R. 13). Upon these facts, the trial court found that appellants were not engaged in interstate commerce or in the production of goods for interstate commerce (R. 22, 26, 28).¹

ARGUMENT

Appellants are engaged in the production of goods for interstate commerce

The District Court, in concluding that appellants were not subject to the Act, relied chiefly on *Holland v. Haile Gold Mines*, 44 F. Supp. 641 (W. D. S. C.).

¹ This case also involves the question whether appellants are entitled to compensation for any part of the time which appellee termed a meal period. The Administrator is not primarily interested in this question, the answer to which, in his opinion, depends upon whether they were relieved of all duties during the meal period. See *Walling v. Dunbar Transfer and Storage Co.*, 6 Wage Hour Rept. 476 (W. D. Tenn. 1943); *Emerson v. Mary Lincoln Candies*, 174 Misc. 353, 20 N. Y. S. (2d) 570 (Sup. Ct. Erie Co., N. Y., 1940), affirmed, 261 App. Div. 879, 26 N. Y. S. (2d) 489, affirmed, 287 N. Y. 33, 38 N. E. (2d) 234,

However, the *Haile* case has subsequently been reversed by the Circuit Court of Appeals for the Fourth Circuit, 136 F. (2d) 102, in an opinion which carefully considers the arguments advanced in support of the District Court's position and explicitly rejects them.²

Under a literal reading of the statute, appellants fall squarely within its coverage as employees engaged in the production of goods for interstate commerce. "Production" as defined in Section 3 (j) of the Act expressly includes "mining." "Goods," as defined in Section 3 (i), means "* * * articles or subjects of commerce of any character," and therefore includes gold bullion, which was specifically described by the Supreme Court as a subject of commerce in the case of *United States v. Marigold*, 9 How. 560, 556-567. "Commerce" as defined in Section 3 (b) includes "* * * transportation * * * from any State to any place outside thereof." The literal lan-

² The view of the Fourth Circuit is in accord with the decisions of this Court and other courts under the National Labor Relations Act (*National Labor Relations Board v. Sunshine Mining Co.*, 110 F. (2d) 780, certiorari denied, 312 U. S. 678; *Canyon Corp. v. National Labor Relations Board*, 128 F. (2d) 953 (C. C. A. 8); cf. *National Labor Relations Board v. Idaho-Maryland M. Corp.*, 98 F. (2d) 129 (C. C. A. 9) in which a contrary result was reached because the Mint was located in the same State as the mine and the subsequent transfer across State lines was considered an administrative act of a Government agency). See also *Timberlake v. Day and Zimmerman*, 49 F. Supp. 28 (S. D. Iowa).

guage of the statute thus expressly encompasses these employees.³ *Walling v. Haile Gold Mines*, 136 F. (2d) 102.

The court below did not explain the basis for its conclusion that the appellants were not engaged in the production of goods for commerce, except to cite the subsequently reversed District Court *Haile* decision and to emphasize (R. 22, 26, 28) that the ores were shipped to a United States Mint. But transmission through the mails has long been recognized as interstate commerce (*International Textbook Co. v. Pigg*, 217 U. S. 91) and the mere fact that the customer is a United States Mint does not render it any the less so (*National Labor Relations Board v. Sunshine Mining Co.*, 110 F. (2d) 780 (C. C. A. 9), certiorari denied, 312 U. S. 678).

Nor can there be any question of the constitutional power of Congress to regulate the wages and hours of these employees, as suggested by the District Court in the *Haile Gold Mines* case even if it be conceded, arguendo, that there is no interstate competition in gold and silver. See *United States v. Darby*, 312 U. S. 100, in which the Supreme Court sustained the constitutionality of the Fair Labor Standards Act, and said (p. 116):

* * * the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

³ The coverage of the Act is to be broadly construed. *Fleming v. Hawkeye Pearl Button Co.*, 113 F. (2d) 52 (C. C. A. 8); *Bowie v. Gonzalez*, 117 F. (2d) 11 (C. C. A. 1).

It is not necessary that the article regulated by Congress be of a "commercial" character, as the cases relied on by the Supreme Court in *Darby* well demonstrate. See *Gooch v. United States*, 297 U. S. 124 (kidnapped persons); *Brooks v. United States*, 267 U. S. 432 (stolen automobiles); *Weber v. Freed*, 239 U. S. 325 (prize fight films); *Hoke v. United States*, 227 U. S. 308, and *Caminetti v. United States*, 242 U. S. 470 (women for immoral purposes); *Champion v. Ames (Lottery Case)*, 188 U. S. 321 (lottery tickets); *Reid v. Colorado*, 187 U. S. 137 (diseased stock); *United States v. Simpson*, 252 U. S. 465; and *United States v. Hill*, 248 U. S. 420 (intoxicating liquors for personal use). This point was reiterated more recently in *Edwards v. California*, 314 U. S. 160, where the Court, in striking down as an invalid regulation of interstate commerce an attempt by the State to exclude indigent persons, said:

It is immaterial whether or not the transportation is commercial in character (p. 172).

The Fair Labor Standards Act also has been held applicable to goods which never came into competition with goods in other States. In addition to *Walling v. Haile Gold Mines, supra*, see *Atlantic Co. v. Walling*, 131 F. (2d) 518 (C. C. A. 5); *Hamlet Ice Co., v. Fleming*, 127 F. (2d) 165, certiorari denied, 317 U. S. 634; *Chapman v. Home Ice Co.*, 136 F. (2d) 353 (C. C. A. 6), petition for certiorari pending, in which the Act was held applicable to the production of ice used for the refrigeration of freight cars and consumed in transit, so that it never reached another State as an article of trade.

CONCLUSION

Appellants' activities fall within the literal language of the statute and are subject to congressional regulation under the Commerce Clause. Accordingly the court below erred in concluding that appellants were not engaged in work subject to the Act.

Respectfully submitted.

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United States Department of Labor.

OCTOBER 1943.

No. 10,526

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

AL C. FOX, COLLISON GILBRETH, R. E. SUTTON, ORVILLE HUTCHINS, JOHN S. JONES, NEPHI N. DUSTIN, MERRILL C. HUTCHINS, H. M. CHILDERS, WARREN S. MORDEN, EDWARD F. O'NEILL, PHILIP EDGAR FERRIS,

Appellants,

VS.

SUMMIT KING MINES, LIMITED
(a corporation),

Appellee.

BRIEF FOR APPELLEE.

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Appellants,

vs.

SUMMIT KING MINES, LIMITED
(a corporation),

Appellee.

BRIEF FOR APPELLEE.

**STATEMENT OF PLEADINGS AND STATEMENT OF
FACTS CONCERNING JURISDICTION.**

This action was brought by eleven former employees (appellants) of the Summit King Mines, Limited, a Nevada corporation (appellee), against their former employer, seeking to recover alleged unpaid overtime compensation, penalties and attorneys' fees. (Rec. 2-11.) The action was based upon appellant's alleged right of recovery therefor under the provisions of "Fair Labor Standards Act of 1938" (Chapter 8, Title 29, U.S.C.A. 201-219, 52 Statutes 1060).

The appellee, by its answer, denied that there was any unpaid compensation due to the appellants and by its answer also denied that it was engaged in commerce within the provisions of the "Fair Labor Standards Act of 1938". (Rec. 12-14.)

The claim of the appellants was that each of the plaintiffs involved had worked a period of eight hours each day of their employment for the period prior to April 22, 1941, had only been paid for seven hours, and that during the period of employment subsequent to April 22, 1941, they had worked for eight hours each day and had not been paid for forty-eight and forty-nine minutes of such time, each day during that period. (Rec. 4-5.) Appellants contended that while the company had ostensibly allowed them, prior to April 22, 1941, a full one hour lunch period and subsequent to April 22, 1941, forty-eight or forty-nine minutes for a lunch period, that such time was not actually available to them and that they were compelled by their duties to remain in attendance upon their work for the full period of eight hours each day. (Rec. 55-57, 105-106, 125-127.)

The Company's position was that prior to April 22, 1941, all of the plaintiffs who had been employed during such period had had available to them a full one hour's free time within which to eat their lunch or in which they might occupy themselves as they saw fit free of any duties and that the men did utilize this free time in eating their lunch, resting, reading, changing their clothes and taking showers. (Rec. 67-68, 152, 155-157, 167, 206-207.) The company contended

that after April 23, 1941, in order to grant the men more overtime, the lunch period was reduced to forty-eight or forty-nine minutes, depending upon the work the men performed and the men were paid overtime for the extra eleven or twelve minutes worked each day. During this latter period all of the men had such forty-eight or forty-nine minutes daily available to them free of duties (Rec. 64-65), so appellee contended, and which time they utilized for their own benefits. (Rec. 151-152.) Its position, therefore, was that the men had been paid in full all compensations due them.

The case was tried before the District Court, without a jury, and the District Court found in favor of the defendant and against the contentions of the appellants, upon the merits of the controversy. It further held that none of the appellants, during his period of employment by appellee, was engaged in commerce or in the production of goods for commerce. (Rec. 27-31.) It therefore ordered judgment entered accordingly. (Rec. 30-31-32.) From this judgment appellants have appealed. (Rec. 32-33.)

STATEMENT OF THE CASE.

The appellee, Summit King Mines, Limited, is a Nevada corporation and at the time of the proceedings herein involved, was engaged in the mining and milling of gold and silver ores at its mine and mill located in Churchill County, Nevada, some thirty miles from the City of Fallon, Nevada. (Rec. 3, 12.) The product

of its operations was gold and silver bullion, which was shipped direct by United States mail from the mine to the United States government, at the United States mint at San Francisco, California. (Rec. 15.)

The mill operated by the appellee was a small mill of seventy ton capacity, but which actually turned out a daily tonnage of only about fifty-four and one-half tons. (Rec. 153-154.) In the mill certain machinery was used, including a ball mill, classifier, several agitators and thickeners and two diesel engines. (Rec. 183.)

The operations of the mill and its processes produced precipitates which were taken from the mill from time to time and milled into bullion. (Rec. 82, 183.)

The mill operated continuously twenty-four hours a day. (Rec. 46.) The work in the mill was divided into three shifts. The day shift commenced at 7 o'clock in the morning and ended at 3 o'clock in the afternoon. The afternoon shift commenced at 3 o'clock in the afternoon and ended at 11 P.M. The "graveyard" shift commenced at 11 P.M. and ended at 7 A.M., the following morning. (Rec. 46.) Two men were employed on each of the three shifts. During the periods of which the appellants here complain, one man was employed as a ball mill man and one man as a solution man, the latter being in charge of the shift. (Rec. 48.)

The evidence of the appellee tended to establish that in so small a mill, one man on each shift could handle

the work and one man could therefore relieve the other for any necessary period. (Rec. 179-180.) At the date of the trial of the action, the mill was being so operated solely by one man on some shifts. (Rec. 208.)

The duties of the ball mill man were to check the tonnage and classifier overflow, and ball mill density gravity, to take a sample of classified overflow for values and for grind, to take a mill sample, add cyanide or lime, and titrate the primary thickener solution for lime and cyanide and to weigh the solution for tonnage. (Rec. 47-48.)

The duties of the solution man were to operate the solution end of the mill, take samples, do the titration, weigh the pulp for gravity, take care of the precipitation, see that the solutions in the tanks were kept at the right levels and to watch the Diesels. (Rec. 58-60, 104-105.)

Written entries were made by the ball mill man once an hour and by the solution man three or four times a shift upon sheets furnished by the appellee for that purpose. (Rec. 59.)

Only about 50% of these men's time was occupied in manual labor. The remaining part of their working time was occupied simply in overseeing the various machines and processes to see that the mill was functioning properly. (Rec. 86, 184-185.)

All of the appellants had, at a time previous to the action, been employed either as ball mill men or solution men at appellee's said mill. (Rec. 4, 13.)

The mill men that were employed by appellee made out their own time cards, showing the hours worked each shift. (Rec. 61, 116-117.) Their cards were signed by the solution man, who was in charge of the mill during that shift and at a later date signed by the mill superintendent. (See original exhibits sent to Circuit Court of Appeals.) In none of the time cards made out by the appellants here involved was there any overtime claimed which was not paid for, prior to this action, by the appellee. (Rec. 116-117, 29.) (Original Exhibits E, G, and I to P, inclusive.)

The mill of appellee began operations on January 5, 1940, when the forty-two hour week was in effect, under the Fair Labor Standards Act, and was in continuous operation up to the date of the trial in the District Court of this action.

On December 29, 1939, and prior to the commencement of operations in appellee's mill, there was posted in the mill a notice to the employees on a daily wage basis. This notice was to the effect that the men would work seven hour shifts relieving each other one hour for lunch; that is the ball mill operator would relieve the solution man for one hour and the solution man would relieve the ball mill man for a different hour. Thus each man was to work seven hours a day of the eight hour shift and was to work six days per week. The operator relieving was to be responsible during the lunch period for the other operator's work as well as his own. (See Defendant's Exhibit B, Rec. 67.)

The wages of the solution man from January 5, 1940, to June 11, 1940, were \$6.00 per day and the

wages of the ball mill man were \$5.50 per day. (Rec. 61.) This wage was increased in June of 1940 by 35¢ so that from June 12, 1940 to October 23, 1940, the wages of the solution man was \$6.35 and that of the ball mill man \$5.85. (Rec. 152.)

On October 23, 1940, when the forty hour week went into effect, appellee complied therewith by paying overtime for all hours over forty hours per week, but the shift remained seven hours with one hour for lunch, as theretofore, and the base wage remained unchanged.

On April 23, 1941, the men went out on strike and a committee appointed by the miners and mill men met with the manager of appellee and asked for an increase in wages. This increase was given by permitting the solution men to work eleven minutes more per shift and the ball men twelve minutes more per shift, for which overtime was paid, resulting in an increase in earnings of approximately \$1.50 per week, but the lunch period was correspondingly changed to forty-nine and forty-eight minutes for the respective mill men. (Rec. 62-63, 64-65, 98.)

The evidence of the appellee is that it heard no complaints at the time of this strike that the men were not being paid overtime for any period worked during the lunch hour. (Rec. 151.) Mr. Fox's testimony corroborates this evidence. (Rec. 63.)

The various appellants were employed by appellee during the following periods: Orville Hutchins was employed January 2, 1940 to February 17, 1941; John S. Jones was employed September 10, 1940 to March

31, 1942; Warren S. Morden was employed January 2, 1940 to June 14, 1940; Edward F. O'Neill was employed January 2, 1940, to December 29, 1940; R. E. Sutton was employed from January 2, 1940 to December 3, 1940; H. M. Childers was employed May 18, 1940 to June 19, 1941; N. N. Dustin was employed January 2, 1940 to June 19, 1941; Philip Edgar Ferris was employed July 18, 1940 to March 29, 1942; Al C. Fox was employed January 5, 1940 to January 30, 1942; Collison Gilbreth was employed July 25, 1940 to June 8, 1940; Merrill C. Hutchins was employed from November 5, 1940 to June 20, 1941. (Original Exhibits E, F, H, I to P, inclusive.)

The evidence of both appellants and appellee shows that the rule prescribed by the company for each man to have a definite hour for his lunch period was not observed strictly by the men nor was it strictly enforced by the company. The evidence shows the men ate their lunch at such times as was most convenient to them. The evidence of the appellee showed that each of the men were allowed and utilized at least their full hour of free time during each shift in eating lunch, resting or utilizing the time before the end of the shift to change clothes and take showers. (Rec. 145-150, 164, 193-206.) The attitude of the appellee was that it was best not to antagonize the men by insisting that they use their free time all in the same hour, but the company allowed them to utilize it in such manner as they saw fit so long as their free time did not unduly exceed the hour allowed. (Rec. 164, 206-207.) The testimony on the part of the appellee can be summarized as showing that the men usually

ate lunch or rested for a half hour or more during each shift, and used another half hour or more in changing clothes and taking showers at the end of the shift.

Only three of the appellants testified—Mr. Fox, Mr. Childers and Mr. Morden. (Rec. 45-143.) None of them gave any direct testimony as to the specific time they worked in any given work week. The substance of their testimony was to the effect that they were never able to take a *full* hour's time out during each eight hour shift away from their work. (Rec. 56, 105-106, 125-127.) They testified that they were sometimes interrupted in their lunch to perform duties. (Rec. 56, 105-106, 125-127.) This testimony was contradicted on the part of appellee. (Rec. 146-150, 206-207.) They all admitted taking time out from their duties for their lunch of varying lengths. (Rec. 70, 109, 127.) The testimony of these appellants as to how much of their free time was actually used is exceedingly vague. Mr. Childers testified that he was interrupted during his lunch period *several* times to perform duties. (Rec. 105-106.) Mr. Childers admitted using the change house, some distance from the mill, for the purpose of taking showers and changing his clothes during the shift. (Rec. 110.) Mr. Morden denied he ever took a shower during the shift, but admitted that for a while he used the change house at the beginning and end of a shift to change clothes. (Rec. 141.) Mr. Fox denied he had ever taken a shower during the shift, but did not deny that he had used the change house for the purpose of changing his clothes as testified

to on the part of appellee. (Rec. 228-229.) No evidence was offered by the appellants as to the time actually worked by appellants Collison Gilbreth, R. E. Sutton, Orville Hutchins, John S. Jones, Nephi N. Dustin, Merrill C. Hutchins, Edward F. O'Neill and Philip Edgar Ferris, or how they spent their free time, except Mr. Fox testified, "Their routine of work and practice of eating lunch was the same as his". (Rec. 57.)

Upon all of the testimony the lower Court found to the effect that plaintiffs' claim for overtime work had not been sustained. It further found that each of the plaintiffs had been free of duty for the period of one hour during each shift and had been paid overtime for all hours worked in excess of forty-two hours a week during the period of employment from January, 1940, to October, 1940, and that from October, 1940, to the termination of his employment each of the plaintiffs had been paid overtime for all hours worked in excess of forty hours per week. It likewise found that none of the plaintiffs had performed any work or labor for the defendant during the lunch hour or at any other time for which he had not received his overtime pay. It found that none of the plaintiffs had made any claim for payment of overtime until the making of demand upon defendant prior to the filing of the action in the present case. It further found that none of the plaintiffs during the period of employment by defendant was engaged in commerce or in the production of goods for commerce. (Rec. 28-30.)

The Court entered judgment accordingly for the defendant, the appellee here. (Rec. 31-32.)

From this judgment the appellants have appealed and have assigned as error the various findings of fact and conclusions of law of the District Court wherein the District Court found the appellants were not entitled to overtime and have also assigned as error the findings of the District Court that the appellants herein were not engaged in commerce or in the production of goods for commerce.

In their brief filed herein, appellants have discussed the alleged errors under five headings. The questions discussed under these headings all involve either one of the two following matters: Whether the District Court was justified by the evidence in finding that appellants herein were not entitled to any overtime pay; whether appellants, during their employment by appellee were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

The administrator of the Wage and Hour Division of the United States Department of Labor, has filed herein as *amicus curiae*, a brief upon the second question above mentioned, but has not submitted any brief upon the first matter, and states in his brief that the administrator is not primarily interested in that question.

QUESTIONS INVOLVED.

The questions involved on this appeal logically fall into the following two divisions:

1. Was the District Court justified by the evidence in finding that appellants herein were not entitled to any overtime pay?

2. Were appellants, during their employment by appellee, engaged in the production of goods for commerce within the meaning of the Fair Standards of Labor Act.

ARGUMENT.

1. **WAS THE DISTRICT COURT JUSTIFIED BY THE EVIDENCE IN FINDING THAT APPELLANTS HEREIN WERE NOT ENTITLED TO ANY OVERTIME PAY?**

The action of appellants is grounded upon the Fair Labor Standards Act of 1938 (29 U.S.C.A., Sec. 201 to 219).

By Sec. 207 of that Act, it is provided, in substance, that no employer should employ any of his employees who is engaged in commerce or in the production of goods for commerce for a work week longer than forty-two hours during the second year from the enactment of the Act, or for a work week of forty hours after the expiration of the second year from the enactment of the Act unless the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

By Sec. 203, subdivision g, "employ" includes "to suffer or permit to work."

The gist of the appellants' action, therefore, is that the appellee here suffered or permitted the appellants to *work* longer than forty-two hours per week prior to the expiration of the second year after the Act became effective, and to *work* for a work week of more than forty hours after the expiration of the second year after the Act became effective without paying the required overtime.

In this case the appellants were present on the appellee's property eight hours of each day during their respective times of employment. How much of that time they were suffered or permitted to *work* depends upon the use they made of the free time granted by the appellee during each shift.

In the case of *Skidmore v. Swift & Co.*, 136 Fed. (2d) 112, (C.C.A. 5th Circuit) the Circuit Court for the Fifth Circuit points out the distinction that must be kept in mind in this character of case between "working" and "being available for work."

The Court in that case said:

"The Act does not require payment of wages to an employee merely because he is away from home. Nor does the Act undertake to regulate or restrict reasonable and bona fide agreements whereby an employee agrees to be available if needed. 'Working' is not synonymous with 'availability for work.'

Plaintiffs, in their proof, have failed to segregate sleeping time from non-sleeping, pool,

domino, and radio, playing time. Even if the plaintiffs had been entitled to recover for hours spent in boredom, or waiting for bedtime, or an alarm, the proof wholly fails to prove the actual hours spent either in sleeping, playing pool, dominoes, or radio, *dressing*, shaving, *bathing*, or in any of said enterprises, the burden of which was on the plaintiffs.

The judgment below is affirmed.” (Italics ours.)

The appellee contends that the facts shown in the District Court do not justify the appellants’ contention that they were suffered or permitted to work during the free time provided for by appellee, and the District Court was correct in so holding.

The findings of the lower Court are contrary to the contentions of appellants.

Rule 52 of the Federal Rules of Civil Procedure provides, in part, as follows:

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

If the findings of the District Court are supported by substantial evidence and are not clearly erroneous the judgment of the District Court should be affirmed. (See *United States v. Foster*, (C.C.A. 9th Circuit) 123 Fed. (2d) 32.)

The burden of proof in the lower Court was on the appellants and if they failed to establish by a pre-

ponderance of the testimony that they had actually worked overtime hours for which they were not paid, then they were not entitled to recover and the judgment of the District Court is correct. (See *Lowrimoore v. Union Bag and Paper Corp.* (D. C., S. D. Ga. 1939) 30 Fed. Supp. 647.)

The burden was likewise upon appellants, as pointed out by *Skidmore v. Swift & Co.* (supra) to show how they spent their time while on the property and how much was spent in eating lunch, taking showers, changing clothes and resting.

It is apparently the theory of the appellants that when they were eating their lunches that they were in such close proximity to their work that they were rendering service to the employer by observing the equipment and the machinery of the mill and were entitled to this time as hours worked. The weight of the evidence will not bear out appellants' theory in this respect. As will be hereinafter pointed out, the testimony shows many of the men ate their lunch in the office, or where only a small part of the mill might be seen, many outside of the mill altogether, some in the change room, and in the case of one man, usually he visited in the assay office some distance from the mill proper.

In the brief of appellants, at page 57, in referring to the time spent by the men changing their clothes, resting, reading and in taking showers, it is stated:

“The appellee evidently relies to a great extent upon the appellants taking advantage of the com-

pany's time in loafing with their lunch boxes open, reading on shift and taking showers before the shift was ended but in that respect, we must contend that the employees were, at all times, under the control of the mill superintendent and such practices, if indulged in, could have been restricted or prohibited."

At page 46 of appellants' brief, it is also stated:

"The appellee has attempted to show by its witnesses that the appellants spent a half hour or more in taking a shower and changing their clothes in the change-room, which evidence is also very indefinite and there has been no showing on the part of the appellee that such time was to be deducted or could be deducted from appellants' wages or periods of employment. If the men took time to take a shower or change their clothes, it was during the latter part of their shift and before leaving their places of employment and hence could not be connected in any way with the lunch period for which time was deducted in the manner stated in the rules posted on December 29, 1939, and April 22, 1941.

If the manager and the superintendent knew of such practice, and had any objection to it, then they could easily have put a stop to that practice or discharged such employees if they were doing so on company time, for neglecting their duties."

Appellants apparently misconceive the requirement of the statute. An employer is not required to pay overtime for hours not *worked*. Furthermore, as pointed out in *Skidmore v. Swift & Co.* (supra), the burden is upon the employee in a case of this char-

acter to show how much time was spent in work and the amount spent by the employee in activities in his own behalf. This was not attempted by the appellants in the District Court. It is the contention of appellee that the evidence in the District Court amply supports the conclusion of the trial Court that the appellants did not work more than seven hours per day; that they were not working when they were eating their lunch, or resting after their lunch period, nor were they working in the time used to change their clothes or take showers.

The following is illustrative of the evidence.

Mr. Dobson, manager of the mine and mill, testified that he went to the mill two or three times a week and spent from forty-five minutes to two hours examining the mill records; that during that time he had an opportunity to observe the various plaintiffs in this action. His testimony was that Mr. Fox had his lunch sometimes in the mill office and sometimes on a bench outside the mill office and sometimes sitting on some steps; that Mr. Fox was always leisurely about eating his lunch and would spend well over a half-hour in doing so. He further testified that never once did he see Mr. Fox get up and go around the mill or interrupt his lunch. (Rec. 146-147.) His testimony as to Mr. Childers was similar. (Rec. 147.) Mr. Dobson testified that Mr. Morden spent one-half an hour or a little better eating his lunch in the mill; that he couldn't recollect seeing him go around the mill while he was eating. (Rec. 147-148.) Mr. Dobson testified that he saw Mr. Orville Hutchins eating his

lunch in the mill and that he took a little longer than the others—a good forty-five minutes; that many times Mr. Dobson saw him in the change room during the lunch period; that Mr. Hutchins never interrupted his lunch to work around the mill. (Rec. 148-149.) His testimony as to Mr. Jones was similar. (Rec. 149.) His recollection as to Mr. O'Neill was that he took longer than the others—about forty-five minutes, and he did not see Mr. O'Neill get up and go around the mill and attend to any duties while he was eating. (Rec. 149.) Mr. Sutton, he testified, took about the same time as the others and Mr. Dustin was the same, and neither of these parties did he ever see interrupt their lunch to work about the mill. (Rec. 149-150.) As to Mr. Ferris, his testimony was similar. (Rec. 150.) Mr. Dobson further testified that the men usually went to the change house *half an hour to forty-five minutes before the end of the shift and there took showers and changed clothes.* (Rec. 155-156, 165-166.)

Mr. Dobson's testimony is substantially corroborated by the testimony of Mr. Clawson, the superintendent of the mill since 1940. Mr. Clawson testified substantially the same as Mr. Dobson concerning the practice of the men in taking showers and changing clothes during the shift period. (Rec. 203-204.) Mr. Dobson testified that they were permitted to do this so as to finish off the lunch hour. (Rec. 167.) Mr. Clawson's testimony as to the time spent by the men in eating their lunch was similar to that of Mr. Dobson. He testified that Mr. Fox ate lunch either inside or just outside the office. (Rec. 193.) That Mr. Gilbreth ate

lunch in the office and at times took a great deal of time, sometimes as much as one and one-half hours. (Rec. 194-5.) His testimony as to Mr. Jones was that Mr. Jones did stay as much time as possible in the office all through the shift, and that he spent as long as one and one-half hours in eating his lunch. (Rec. 197.) As to Mr. Orville Hutchins, he visited around during the lunch hour and often spent well over an hour in eating. That Mr. Hutchins often went to the assay office and to the main hoist house and to the change room during the lunch hour. (Rec. 197-198.) He further testified that Mr. Dustin's practice was to take time off in the office or in the assay office where he had been a helper. (Rec. 198-199.) That Merrill C. Hutchins consumed fifteen to twenty minutes actually eating his lunch and sat around for fifteen or twenty minutes after eating, and sometimes more. (Rec. 199.) That Mr. Childers took from fifteen to twenty minutes actually eating his lunch and then sat around in the office. That most of the men tried to consume the big end of their lunch hour sitting down and taking their own time. (Rec. 200.) As to Mr. Morden, he testified that he consumed fifteen to twenty minutes for his meals, but that he did not know how he would use his time after he had finished eating. (Rec. 201.) He stated that Mr. O'Neill's practice was to take a very long lunch hour, at one time two and one-half hours and that on all other occasions he consumed his full hour. (Rec. 202.) That Mr. Ferris consumed from fifteen to twenty-five minutes eating his meal and after finishing he usually sat around in the office for a period of thirty minutes. (Rec. 203.)

The position of the management of the appellee, as expressed both by Mr. Dobson and Mr. Clawson was that the mill men were free from all supervision for a period of one hour during their shifts prior to April 22, 1941 and for forty-eight or forty-nine minutes subsequent to April 22, 1941. (Rec. 151, 174-175, 205-206.) Mr. Clawson expressly testified that if a man spent twenty minutes in actually eating his lunch and sat down for forty minutes more and told Mr. Clawson that it was his lunch period, then he was entitled to take that time out. (Rec. 206-207.) On many occasions Mr. Clawson found the men sitting down after eating hours or after they had finished their lunch and if the men told him that it was their lunch period he wouldn't bother them. (Rec. 207.) Mr. Dobson testified that it was the general practice that the men could eat their lunch when and where they wanted. Only if they took more than an hour would their attention be called to it. (Rec. 155.) He further testified that the management knew the men were changing clothes and taking showers on company time and that it was an adjustment due the men if they didn't take a full hour in their lunch period. (Rec. 155-156.) Mr. Dobson further testified that any time the men worked during the lunch hour and placed it on the time cards that they were paid for it. (Rec. 163, 178.)

As to all of this testimony of the appellee, there is no contradictory testimony so far as it concerns the appellants, other than Fox, Childers and Morden. None of the other appellants testified in the action

although appellant Jones was sworn, (Rec. 45), but did not testify.

In view of the testimony submitted in the District Court, it is the contention of appellee that the findings of the lower court certainly are not "clearly erroneous," within Rule 52 of The Rules of Federal Procedure.

Furthermore even if the evidence of the appellants who did testify in the District Court had been taken at its full value and if the trial court had concluded therefrom that such appellants had not had available to themselves a *full* hour any shift, any judgment as to the amount of time worked would have been wholly speculative.

See *Jax Beer v. Redfern*, 124 Fed. (2d) 172, where the court of appeals for the Fifth Circuit held:

"The evidence as to the material facts in the case is so uncertain and conjectural that we find nothing substantial upon which to predicate a verdict. To uphold the findings and judgment of the lower court we must base decision upon the guess, speculation, and averages made up from the uncertain recollections of these appellees. This we refuse to do."

A somewhat similar contention, as made by the appellants here as to their lunch time, was made by the Union Miners at the Mill-Mine Conference held before the Wage and Hour Division of the Department of Labor in Salt Lake City on December 11 and 12, 1940. The evidence offered by the Union at that hearing, in support of its contention that the lunch hour

should be included in the hours worked is, in many respects, identical with the evidence offered in this case. In that case it was testified that the lunch period which was from thirty to thirty-five minutes, was underground; that the employees were not permitted to roam around very far from their place of employment; that shift bosses could come around during the lunch period and give assignments of work for that period which would require the men to work while other men were having their lunch; that the men did not always eat at a regular hour, but ate when they were hungry and that the men always ate no more than fifty to one hundred feet from the place of work. It was also testified that during the lunch period men had to walk a distance of 5000 to 6000 feet to pick up tools to be used in their work in the afternoon following. Men testified that they always considered the lunch period as part of the workday; that they were on the job and they were close to the job and had no opportunity to get away from it. (Transcript of the hearing of the Metal Mining Conference, Dec. 11 and 12, 1940, pp. 41 and following, 85 and following, 35 and following, 102 and following.)

Despite this evidence, in a ruling issued by the Administrator of the Wage and Hour Division after the report of the Examiner at that hearing, it was stated that the lunch hour was not to be considered as hours worked and that the men were not entitled to compensation therefor. In this ruling it is said:

“After arrival at the working face miners begin work and continue until the lunch period.

In a few mines there is no fixed lunch period and the men snatch a bite to eat from time to time during the day. In most mines, however, it is customary to have a set lunch period, usually of half an hour, although occasionally of one hour. Except for those mines where the miners work fairly near the surface and are able to walk out of the mine easily, lunch is eaten underground. The miners ordinarily congregate at some convenient place not far from their working face. In a number of mines heated or dry places and lunch tables are provided. In general, however, the lunch is brief, at or near the workplace and without formalities or conveniences that would interfere with an instant return to work.

* * * * *

Both unions contend that the workday should include the lunch period. The mine operators contend in general that the lunch period should not be counted as part of the workday. In Interpretative Bulletin No. 13 this matter is left open:

‘No opinion can be expressed at this time as to certain cases—e. g., employees engaged in mining or in working under high pressure—where by custom or agreement time spent eating meals is paid for as hours worked.’

It should be pointed out, first, that in many mines the lunch period is not paid for. It may also be noted that in some mines there is no lunch period. In support of their contention, the unions refer to the fact that on occasion a miner may be instructed to defer or advance his lunch period on instructions from his superior. They also point out that on some occasions the miners may use their lunch period for obtaining tools or on other

occasions they may not eat during the whole of the period. These contentions do not go to the heart of the matter. The question to be determined is whether or not a full lunch period of not less than one-half hour should be considered as 'hours worked.'

* * * * *

Some of the hazards of underground employment continue and it is unquestionably less relaxation for a miner to eat underground than it would be to eat on the surface. His movements are necessarily limited and his opportunity for rest is constricted. However, these are matters of degree. In spite of these disadvantages there remains a sharp distinction on the one hand between the time when the miner is drilling, etc., or traveling to his place of work, and on the other hand, the lunch period. There is a considerable element of relaxation involved and except for safety restrictions the miner is free from supervision for the lunch period. Balancing these opposing considerations it is felt that the lunch period of one-half hour or more, in general, to the extent that it is actually used as a period for lunch or relaxation, should not be counted as hours worked under the act.

* * * * *

The workday does not include any fixed lunch period of one-half hour or more during which the miner is relieved of all duties, even though the lunch period is spent underground."

This ruling was followed by an action for declaratory relief brought in the District Court of the United States for the District of Idaho in the case

of *Sunshine Mining Co. v. Carver*, 41 Fed. Sup. 60, wherein the union offered exactly the same evidence as was offered at the Metal Mining Conference in Salt Lake City in respect to the practices of employer and employee during the lunch hour. In following the ruling of the Administrator in holding that the lunch hour constituted no part of hours worked, the court says at page 66 of 41 Fed. Sup.:

“Second, should the time consumed at the lunch period be included as time worked? The method used by plaintiff and the employees, in determining what that time is, appears to be that the underground workmen records on a card each day, the time he actually worked, and delivers it to the foreman, and should he work a part of that period he is paid overtime for the part he did so work. The keeping of it is left to the honor of the employee and the method seems to be fair to the workmen. Before and after the adoption of the Wage and Hour Law the lunch period has been set aside as non-working time and that was recognized by the Union who did not consider the lunch period as time worked, as appears by the proposed contracts they submitted to the plaintiff. They knew before entering the mine that they are granted a lunch period of a certain time in which to eat their lunch and rest while in the mine, and when in doing so they are relieved of all duties. Under such circumstances, in the absence of an agreement, between the employer and employee, that the lunch period should be work time, the conclusion is inevitable that one would not be actually working while he is

eating his lunch or resting, for he is not at that time rendering any services."

It is likewise true in the present case that the time cards were filled out by the employees, and the testimony was that no man asking overtime was ever refused it.

A second decision following the ruling of the Administrator is that of *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123* (D.C., N.D. Ala. S.D.), 40 Fed. Sup. 4. In holding that the lunch hour could not be included in the hours worked and as part of the work week for which the employees should be paid overtime, the court says at page 10:

"We conclude that the fixed lunch periods of one-half hour during which the employees have been relieved of all duties are not part of their employment or of their workweek.

The conclusions here stated have been reached by examination of the facts existent in the plaintiffs' mines during the period in which the underground ore miners are claiming that they earned unpaid compensation for overtime work under the provisions of the Fair Labor Standards Act. It may be helpful, however, to observe that these conclusions are the same as those announced in the summary of the so-called 'modified portal to portal' opinion of the Administrator of the Wage and Hour Division of the United States Department of Labor on March 15, 1941, which summary is as follows:

'The workday in underground metal mining starts when the miner reports for duty as re-

quired at or near the collar of the mine, and ends when he reaches the collar at the end of the shift.

‘The workday also includes the aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out.

‘The workday does not include any fixed lunch period of one-half hour or more during which the miner is relieved of all duties, even though the lunch period is spent underground.’ ”

Appellants rely upon the following cases to sustain their conclusions: *Walling v. Dunbar Transfer and Storage Company, Inc.*, a District Court case from the Western District of Tennessee reported in 6 *Wage and Hour Reports* 676; *Fleming v. Rex Oil and Gas Company*, 43 Fed. Sup. 950, a case involving oil drillers required to watch the oil pumps during their entire shift; and *Travis v. Ray*, 41 Fed. Sup. 6, which involved a question of waiting periods between trips by motor bus drivers.

It would appear to appellee that all of such cases are distinguishable from the facts to the case at bar. In *Walling v. Dunbar Transfer*, it appears from the statement of facts given in appellants’ brief that the men ate their lunches while actually working, that is delivering cargos or while waiting at the customer’s place of business, and that in other instances the employees had no lunch and took no time off for lunch, but were docked thirty minutes for lunch and on some occasions, one hour. Obviously the plaintiffs in the *Dunbar* case, from this statement of facts, did not

have the lunch time as their own time, but were required to perform their duties through the lunch period.

In the *Fleming v. Rex Oil and Gas Company* case the drillers were apparently required to watch the operation of the pumps and check on them during their entire shift and were not allowed any free time to themselves. In the case of *Travis v. Ray*, the motor bus drivers were expected to be on the job during the periods between trips and the court points out that the time was not long enough to enable them to go elsewhere or to engage in any other activity.

Appellee submits that these cases are not authority for the position taken by appellants here.

In this connection, the case of *Gordon v. Paducah Ice Mfg. Co.*, 41 Fed. Sup. 980 (District Court, Western District of Kentucky), is more analogous to the situation here existing. In this case the employer was a manufacturer and seller of ice to railroad carriers for the icing of refrigerator cars. Employees performed labor incident to icing the cars over a 24 hour period, which was divided into two 12 hour shifts. After the cars were spotted, the foreman would select a number of men required to perform the work, and when the icing of that particular car was completed, the men were released from further immediate labor, but would remain in the immediate vicinity available for work. The employees contended that this time while they were in the immediate vicinity and subject to call for duty by the foreman was to be included

within the hours of work in the particular work week. The Court says at page 986 of 41 F.S.:

“Defendant contends that since the plaintiffs were paid at the rate of 30 cents an hour for the entire time in which they were actually engaged in icing refrigerator cars, and since the evidence fails to show that any employee was so engaged for more than 42 hours in any one work week, the plaintiffs have been paid in full, even under the provisions of the Act. This contention is correct if the waiting time between the icing of successive cars is not included in the hours of labor. If such waiting time is included, the work week, consisting of 12 hours per day, exceeds the 42 hour maximum. Plaintiffs rely upon the decisions in *Missouri, K. & T.R. Co. v. United States*, 231 U.S. 112, 34 S.Ct. 26, 58 L. Ed. 144; *United States v. Southern Pacific Co.*, 9 Cir., 245 F. 722; *Chicago, R.I. & P.R. Co. v. United States*, 8 Cr., 253 F. 555, and other similar decisions, in which it was held that waiting time under the conditions existing therein should be included within the hours of service. But those cases specifically point out that although the men were waiting and doing nothing they were under orders, liable to be called upon at any moment and not at liberty to go away. As was said in *Missouri, K. & T.R. Co. v. United States*, *supra* (231 U.S. 112, 34 S.Ct. 27, 58 L. Ed. 144) ‘they were none the less on duty when inactive. Their duty was to stand and wait.’ The brief of the Administrator, in relying upon these cases, proceeds upon the assumption that the plaintiffs in the present case were required to be on hand at all times, regardless of the length of time it might be before the arrival of the next car. If such were the facts in this case, the

Administrator's contention would probably be sound, but as has been indicated in the Findings of Fact hereinabove, the situation with respect to these employees was entirely different. They were free to report or not to report as they saw fit; to leave at any time they wished without discrimination if they later decided to return for any work which was available. Although they did stand and wait, yet there was no duty upon them to do so. It seems to the Court that it was simply a case of there being many more applicants for the available work than was needed; and an effort on the part of the defendant to distribute the work fairly evenly among those who needed it and were willing to be present when their services could be used. The situation is essentially different from the facts in the case of *Travis v. Ray*, D.C., 41 F. Sup. 6, recently decided by this Court and in which the Court held that waiting time should be included within the hours of labor. Accordingly, I hold as a matter of law that the waiting time in the present case should not be included within the hours of labor in any particular work week under consideration."

The above case is extremely pertinent in respect to the situation in the case at bar. In this case the undisputed testimony is that one of the men on each shift was free to leave during his lunch hour, leaving the mill in charge of his partner on the shift. The reason the men did not leave the mill was not that their duties were so onerous as to require their presence in the mill, but was purely a matter of convenience, because there was no nearby town and the mill was the warmest and most comfortable spot in which to

eat their lunch. In the present case when one man had finished his lunch, the other millman was perfectly free to do the same thing, and Mr. Morden's testimony is that one man could leave the mill, and the responsibilities of the mill in such case could be handled by his partner. (Rec. 138-139.)

Grave doubt is cast upon the credibility of the witnesses for the plaintiff by the fact that at no time during the period of their employment, (in the case of Mr. Fox 2 years 3 months and that of Mr. Childers a period of 13 months, and that of Mr. Morden a period of 6 months), did any of the appellants make any complaint to the management of the appellee that they were working eight hours and being paid for only seven hours. The men filled out their own time cards on which they placed seven hours of labor for the period prior to April 22, 1941, and seven hours and eleven or twelve minutes, as the case might be, subsequent to April 22, 1941. (Rec. 53-55, 99, 116-117, 132-135.) These witnesses testified that they never put on their time cards any overtime for work during the lunch hour although Mr. Dobson, General Manager of appellee and Mr. Clawson, mill superintendent, testified that the men were never refused overtime when it was asked. Long after the termination of their employment these men make demand for overtime compensation upon a claim that they engaged upon the work of the employer during the lunch hour.

In the case of *Mortenson v. Western Light and Telephone Co.* (D.C., S.D. Iowa W. Div. 1941, 42 Fed. Sup. 319), employees under similar circumstances

were held estopped from claiming that their reports were incorrect.

Even though the rule in the above cited case be not applied, yet the District Court had the right to consider, and should have considered these facts on the issue of whether or not the appellants had performed their right to recover.

In the case of *Sauls v. Martin*, 45 Fed. Sup. 801 (D.C. Western District of South Carolina) the court says:

“As the courts have held, he did not, as a matter of law, by failing to report and collect for overtime hours, waive his right to overtime pay if entitled thereto; but the court can and should consider the circumstances of his failure to report and make claim for this compensation when he should have done so, as above stated, in determining the weight of his testimony on this issue.”

Likewise, in the case of *Brown v. Carter Drilling Co.* (District Court, Southern District of Texas) 38 F.S. 489, in an action by the employee to recover overtime, the court says:

“Certainly the evidence offered by an employee such as is plaintiff who has long received and accepted without protest the pay called for in his contract of employment and who after long delay, and without any reasonable explanation of the delay, sues to recover compensation for overtime and penalties, should be convincing both as to whether such employee is working in commerce and as to the terms of his employment:”

In the case of *Hackworth v. Caddo River Lumber Co.* (District Court, Western District of Arkansas), reported in *Prentice-Hall Labor Service*, Paragraph 11409, in denying recovery for overtime for lunch periods, the court says:

“They were all paid from time to time for certain overtime at the rate of one and a half times their regular hourly rate and the testimony shows that no complaint was made by any of them until the matter was agitated by the plaintiff, J. D. Hackworth.”

Likewise, in the case of *Jackson v. Mid-Continent Petroleum Corporation* (District Court, Eastern District of Oklahoma), as yet unreported, *Prentice Hall Labor Service*, Paragraph 11901, certain truck drivers brought action for overtime compensation. It was their custom to report to the defendant's warehouse each morning to see if there were any orders. If there were no orders, the plaintiffs were free to come and go as they saw fit. Their practice, however, was to stay around the vicinity of the warehouse, and if orders came for a particular driver, he would be called and proceed upon his trip. Plaintiffs were required to fill out and file with defendant weekly time sheets which were signed by the plaintiffs, and the plaintiffs were paid all sums due according to the reports. Plaintiffs never before made any claim for overtime while employed. The Court held that the plaintiffs were not entitled to overtime compensation and rendered judgment for the defendant.

In view of all the evidence, it is appellee's contention,

1. That appellants failed to sustain the burden of proof required of them in the District Court, and

2. That the findings of the District Court that appellants performed no overtime work for which they have not been paid is sustained by the weight of the evidence and therefore cannot be "clearly erroneous."

2. WERE APPELLANTS DURING THEIR EMPLOYMENT BY APPELLEE ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT?

As heretofore pointed out, the District Court in its findings of fact found "that none of the plaintiffs during his period of employment by defendant was engaged in commerce or in the production of goods for commerce." (Rec. 28.)

No evidence was introduced in the District Court upon this point, but it was stipulated that the defendant produced gold and silver ores in Churchill County, Nevada, and that the same were reduced to bullion and transported by United States mail from Churchill County, Nevada, to San Francisco, California, and that the bullion was sold to the United States mint at San Francisco, California. (Rec. 15.)

The District Court also found that all processes of mining and reduction were within the State of Nevada, and that the precipitates of its mill were melted into a dore bullion, the same being a combination of gold and silver bullion and that this bullion was shipped by United States mail to the United

States mint at San Francisco, California, and the value of each shipment of bullion was paid by said United States mint to said defendant. (Rec. 28.)

Both the appellants here and the administrator of the Wage and Hour Division of the United States Department of Labor, in their briefs, have challenged the finding that appellants were not engaged in commerce or in the production of goods for commerce. In making this finding the District Court relied upon and approved the decision reached in *Holland v. Haile Gold Mines, Inc.* (W.D., S.C.), 44 Fed. Sup. 641. The brief of the administrator of the Wage and Hour Division points out that this case has subsequently been reversed, by the Circuit Court of Appeals for the Fourth Circuit, in 136 Fed. (2d) 102.

The *Holland v. Haile Gold Mines* case involved a situation similar to the case at bar. If the decision of the Fourth Circuit Court of Appeals is sound, then the position of the District Court here that it had no jurisdiction in the present instance and that the Fair Labor Standards Act did not apply to appellants is not well taken. However, the decision of the Circuit Court of Appeals of the Fourth Circuit is not necessarily binding upon this court.

Obviously the appellants in the present case are not *engaged* in commerce. If they come within the Act at all it must be because they were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. The District Court in the *Haile* case was of the opinion that the necessary interstate aspect required by the Act was missing for

the reason that since the gold was shipped pursuant to the order of the United States, such shipment would appear to be an administrative act of the government rather than a shipment in commerce. On appeal the Circuit Court for the Fourth Circuit held that the gold did not become the property of the government until it arrived at the mint in Pennsylvania, was duly receipted for, inspected and paid for by United States Treasury check. The appellate court found because of these facts that the business conducted by Haile constituted interstate commerce within the Act and the shipment was not a mere administrative act of the government.

The second ground of the decision in the District Court in the *Haile* case was that there was no competitive market for gold in interstate commerce and therefore the wages paid in its local production could not have any effect on interstate commerce. The Circuit Court likewise rejected this contention and held that the congressional power was not limited to the regulation of interstate *competition*. In support of its holding the case of *United States v. Darby*, 85 Law. Ed. 609; 312 U.S. 100; 61 S. Ct. 451, was cited.

Both the brief of appellants and that of the administrator of the Wage and Hour Division rely on the same arguments as are advanced by the Circuit Court of Appeals for the Fourth Circuit in the *Haile* case. This court has held in *National Labor Relations Board v. Idaho Maryland Mining Corporation* (C.C. A. 9th Circuit), 98 Fed. (2d) 129, that a company engaged in mining gold and silver in California which

sold its product to a government mint in San Francisco was engaged wholly in intrastate activity and was not engaged in business affecting commerce so as to be subject to regulation under the National Labor Relations Act. In passing upon the point therein involved that the gold and silver was thereafter shipped by the mint to Denver for safe keeping, stated:

“We regard such shipments not as commercial transactions, but as administrative acts of government. If, however, such acts may be said to constitute commerce, it is a commerce to which respondents’ activities are not closely, intimately or substantially related and which respondents’ labor practices do not directly or substantially affect.”

While this court in *National Labor Relations Board v. Sunshine Mining Company* (C.C.A. of the Circuit), 110 Fed. (2d) 780, held a mining company, mining gold and silver, subject to the National Labor Relations Act, it must be noted in that case that the company was mining other metals besides gold and silver, including copper and lead which were eventually sold in the open market outside the State. In the case at bar, the only product sold by appellee was its bullion made up of a combination of gold and silver which was shipped to the United States mint at San Francisco. The conclusion of the Fourth Circuit Court of Appeals in the *Haile* case that the shipment of the gold was not an administrative act of the United States would seem to appellee to be questionable.

The *Gold Reserve Act of 1934*, U.S.C.A. Title 31, Sec. 440 to 446, inclusive, and the regulations issued thereunder, in effect, nationalized gold. By Sec. 442, the Secretary of the Treasury was authorized by regulations to prescribe the conditions under which gold might be acquired, transported, melted or treated, imported, exported, earmarked or held in custody only to the extent permitted by and subject to the conditions prescribed in, or pursuant to such regulations.

By Executive Order of August 28, 1933, the President of the United States prescribed, in part:

“After thirty days from August 28, 1933, no person shall hold in his possession, or retain any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor, issued pursuant to this part.”
(*Code of Fed. Regulations*, Title 31, Sec. 50.5.)

By the regulations established by the Secretary of the Treasury, the gold mined by appellee could only be sold by the United States or to a licensee authorized by the United States, at a price fixed by the United States government and at a place directed by the United States government. (See *Regulations of Secretary of Treasury*, *Code of Federal Regulations*, Title 31, Sec. 54.1 to 55.2.)

It will be observed that by the Executive Order above mentioned and by the regulations of the Secretary of the Treasury, and by reason of the Gold

Reserve Act of 1934, that the bullion of appellee was no longer an article of commerce, as that term is ordinarily understood, at the date of the enactment of the Fair Labor Standards Act of 1938. The person mining gold or producing gold bullion could no longer either hold or dispose of the same except by government direction. He was no longer able to sell the same in the open market. His only title or right was the right to transport or otherwise dispose of such product as the regulations of the Secretary of the Treasury might authorize. The license issued pursuant to the regulations of the Secretary of the Treasury, appellee contends, was simply an administrative act of the government of the United States and the gold of appellee must, for necessity, be transported and disposed of in accordance therewith.

Gold and silver have not, in the past, been treated as other mining products. Because of their use as a medium of exchange, the government has placed limitation upon the interests of individuals therein. In the case of *Norman v. Baltimore & Ohio Railroad Co.*, 55 S. Ct. 407, 294 U.S. 240, 79 Law. Ed. 885, the Supreme Court of the United States held:

“The authority to impose requirements of uniformity and parity is an essential feature of this control of the currency. The Congress is authorized to provide ‘a sound and uniform currency for the country,’ and to ‘secure the benefit of it to the people by appropriate legislation.’ *Veazie Bank v. Fenno*, 8 Wall. 533, 549, 19 L. ed. 482, 488.

“Moreover, by virtue of this national power, there attach to the ownership of gold and silver those limitations which public policy may require by reason of their quality as legal tender and as a medium of exchange. *Ling Su Fan v. United States*, 218 U.S. 302, 310, 54 L. ed. 1049, 1050, 31 S. Ct. 21, 30 L.R.A. (N.S.) 1176. Those limitations arise from the fact that the law ‘gives to such coinage a value which does not attach as a mere consequence of intrinsic value.’ Their quality as legal tender is attributed by the law, aside from their bullion value. Hence, the power to coin money includes the power to forbid mutilation, melting and exportation of gold and silver coin,—‘to prevent its outflow from the country of its origin.’ *Id.* p. 311.”

Appellee urges that gold and gold and silver bullion is no longer an article of commerce within the meaning of that term as used in the Fair Labor Standards Act of 1938, but the person mining it has at best only a qualified interest therein. His acts in respect thereto are not voluntary. It must be held and disposed of, as, when and for such compensation as the government shall direct.

It may be argued that because of the silver content contained in the bullion shipped by appellee, the situation is not similar to that where gold alone is shipped. In this connection, it is urged by appellee that because of the gold content of the bullion, it must be disposed of as the government orders. Furthermore the payment for the silver contained in the bullion by the government is not in the nature of a sale, but a charge is

made for the minting of 45% and the balance is minted and returned to the owner. (See *Code of Federal Regulations*, Supp. 1939. Title 31, Sec. 80.9.)

The second ground upon which the District Court in the *Haile* case held that the Fair Labor Standards Act could not apply to the defendant was because there was no competitive market for gold and therefore the wages paid in its local production could not have any affect on interstate commerce. The Circuit Court of the Fourth Circuit rejected this conclusion and as a basis for its holding relied upon the decision of the Supreme Court of the United States in *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 Law Ed. 609, and particularly the language in that decision reading as follows:

“The power of Congress under the commerce clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the constitution.”

Appellee urges that the language quoted from the *Darby* case is not applicable to the subject here under discussion. The language thus used by the Supreme Court of the United States was used in connection with its discussion of the power of Congress to prohibit the shipment of certain goods in interstate commerce. It places its holding as to the validity of the wages and hours provisions upon an entirely different ground. In discussing the validity of the Wage and Hour requirements, the court stated:

“As appellee’s employees are not alleged to be engaged in interstate commerce the validity of the prohibition turns on the question of whether

the employment under other than the prescribed labor standards of employees engaged in the production of goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it."

The Court then points out that Congress has adopted an objective in the suppression of nation-wide competition in interstate commerce by goods produced under sub-standard labor conditions and in that connection has recognized that in present day industry each small part might affect the whole, and that the total affect of the *competition* of many small producers might be great. Its conclusion that the wages and hours provision was valid, therefore, was based upon the fact that the wages and hours of the employees engaged in producing manufactured goods locally was so related to interstate commerce as to be within the power of Congress to regulate.

Appellee submits that the decision in *United States v. Darby* is not a precedent for the application of the same rule to the production of gold bullion. Appellee urges that the Act should not be held to extend to its production. While Congress, under its power to regulate commerce, might lawfully prohibit commerce in gold, the question here involved is whether Congress could, and did intend to reach the matter of wages and hours where such wages and hours could not affect such commerce. Here clearly the matter of sub-standard wages could not affect the commerce in gold and silver bullion. There was no competition. The gold and silver must be sold at a

fixed price either to the United States or to such person as it might designate. The reason for Congress regulating the interstate commerce of articles sold in competition is wholly lacking. It is appellee's position, therefore, that it should not be concluded that Congress regarded gold as an article of commerce within the provisions of the Fair Labor Standards Act, and that it must be presumed that Congress did not intend to legislate concerning wages and hours where the same were not so related to commerce as to affect commerce.

The language of this Court used in the case of *National Labor Relations Board v. Idaho Maryland Mining Corporation* (C.C.A. 9th Circuit), 98 Fed. (2d) 129, reads as follows:

"The Board asserts, without proof, that respondent's production of gold is 'the production of that upon which not only domestic but world trade is based and secured;' that, 'Interstate and foreign commerce being so vitally dependent upon and so delicately adjusted to gold, necessarily the supply of gold critically affects that commerce;' and that respondent's production of gold 'constitutes the very life-blood of commerce, any interference with which would have drastic repercussions in interstate and foreign commerce.'

"On the basis of these unproved and, we think, unprovable assertions, the Board asks us to hold the National Labor Relations Act applicable to respondent. This we decline to do. Jurisdiction of respondent's labor relations cannot be predicated upon the fact that it happens to be a producer of a metal which, in former times, was used as

money, and which, in this country, still bears some relation to money. If that were sufficient to confer jurisdiction, every employer who pays wages, buys goods or spends money for any purpose—in other words, all employers—would be subject to the Act, which manifestly is not the case.”

The reasoning in the foregoing is applicable, appellee contends, to the situation here presented. It should not be concluded, appellee urges, that Congress meant to regulate wages and hours of an article in which no competitive market existed and which, therefore, would not be affected by the question of whether the wages paid were high or low, or whether the hours worked were long or short.

For the foregoing reasons the judgment of the District Court should be affirmed.

Dated, Reno, Nevada.

December 8, 1943.

Respectfully submitted,

THATCHER & WOODBURN,

GEO. B. THATCHER,

WM. WOODBURN,

WM. J. FORMAN,

Attorneys for Appellee.

13
No. 10,526

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

AL C. FOX, COLLISON GILBRETH, R. E.
SUTTON, ORVILLE HUTCHINS, JOHN S.
JONES, NEPHI N. DUSTIN, MERRILL C.
HUTCHINS, H. M. CHILDERS, WARREN
S. MORDEN, EDWARD F. O'NEILL,
PHILIP EDGAR FERRIS,

Appellants,

vs.

SUMMIT KING MINES, LIMITED
(a corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

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FILED

DEC 23 1943

PAUL P. O'BRIEN,
CLERK



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No. 10,526

IN THE

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For the Ninth Circuit

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HUTCHINS, H. M. CHILDERS, WARREN
S. MORDEN, EDWARD F. O'NEILL,
PHILIP EDGAR FERRIS,

Appellants,

vs.

SUMMIT KING MINES, LIMITED
(a corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

AS TO APPELLEE'S STATEMENT OF PLEADINGS AND STATEMENT OF FACTS CONCERNING JURISDICTION.

Counsel for the Appellee states on page 2 of their brief that it was "the company's position prior to April 22, 1941, to give all of the plaintiffs who were employed in the mill one hour's free time within which to eat their lunch or in which they might occupy themselves as they saw fit, free of all duties and that the men did utilize this free time in eating

lunch, resting, reading, changing their clothes and taking showers''; that after April 23, 1941, that period was reduced to forty-eight or forty-nine minutes.

It seems that the Appellee is attempting to justify the withholding of one hour's compensation prior to April 22, 1941, and forty-eight and forty-nine minutes after said date by spreading the time by piecemeal over the entire shift.

If such a proposition could be maintained under the provisions of the Fair Labor Standards Act, it would be impossible to enforce the Act in such employments as that engaged in by the Appellants or others engaged in similar employments. It would require a lot of timekeeping to determine when employment time ended and rest time commenced.

AS TO APPELLEE'S STATEMENT OF THE CASE.

The Appellants were employed to work a continuous eight hour shift and their duties and responsibilities were not regulated by a watch but by the operation of the mill.

When the Appellants were hired, the management knew what the practice and custom was in that particular character of work:

“Only about 50% of these men's time was occupied in manual labor, the remaining part of their working time was occupied simply in overseeing the various machines and processes to see that the

mill was functioning properly. (Rec. 86, 184-185.)" (Appellee's Brief, page 5.)

There would be as much justification in withholding fifty per cent of their wages as one-eighth.

AS TO APPELLEE'S ARGUMENT: WAS THE DISTRICT COURT JUSTIFIED BY THE EVIDENCE IN FINDING THAT APPELLANTS WERE NOT ENTITLED TO ANY OVERTIME PAY?

As to the Appellee's contention on that point, we would reply that the services of the Appellants consisted of two functions: keeping the machinery running and the ore or pulp moving through the mill. If those functions were being performed by the Appellants, then the Appellee was receiving the benefit of their services during each hour from the commencement of the shift and until relieved by the man on the next shift. His responsibilities never ceased nor his duties relaxed while the mill was operating on each man's shift even though he might be eating, reading, changing clothes, or otherwise engaged.

Interpretive Bulletin No. 13, was not in evidence in the instant case, but is mentioned in Appellee's Brief, page 23, and cited in one of Appellee's cases: *Mortenson v. Western Light and Telephone Co.* (D.C.S.D. Iowa W. Div. 1941, 42 Fed. Supp. 319), where an extract from said Bulletin 13 reads:

"As a general rule, hours worked will include all time during which an employee is required to be on duty or to be on the employer's premises, or to be at a piece work place, and all time during

which an employee is suffered or permitted to work whether or not he is required to do so.”

Appellee cites the case of *Gordon v. Paducah Ice Mfg. Co.*, 41 Fed. Supp. 980, wherein that Court cited other cases including *Chicago, R.I.&P.R. Co. v. United States*, 253 Fed. 555, which defines waiting time as applied to the Hours of Service Act of March 4, 1907, 34 Stat. 1415, and which we believe is applicable to the case at bar insofar as the Appellee claims that the Appellants had an hour free from all supervision during their shift. (Appellee's Brief, page 20.)

In the last mentioned case the Court provides a rule for determining as to whether or not a man is free from duty and supervision and which is stated as follows:

“The understanding between him and the company, and the practice, was that though at some time he should have his hour off, it was alterable and adjustable to the needs of the office; also that, while off duty during the hour, he was subject to recall by the company whenever its business required. It is clear that the time allowed was so uncertain and restrained that it was not a period for refreshment, rest, and recreation within the meaning of the law. It was not his own, to occupy as he deemed best. He was at his company's beck at any time, and might even be called to the office from the table. He was not free to go from his home beyond reach of a summons to active duty, but had to hold himself within call and in readiness to respond at any moment. Instead of that sense of freedom essential to mental and physical

relation, a tenseness was imposed as by an alarm clock sounding peremptorily, but with uncontrolled regularity. The hour of rest and refreshment was dominated by the business requirements of the company. * * *

The arrangement between them and the practice determined their relation, and whether the operator should be regarded as free or on continued duty. This conclusion is in harmony with the decisions of this and other courts."

There is probably no fixed and definite rule by which to determine whether or not the employee comes within the term "employ" which includes "to suffer or permit to work".

The cases cited by Appellee as well as the one at bar must be determined by the character of work and the usual practice and custom in connection with it.

The Appellants were required to account for each hour of an eight hour shift on a work report sheet, samples of which were sent up from the trial Court as exhibits.

The Appellants naturally had enough pride in their work and wanted to be able to turn in a satisfactory report for each hour of their shift.

In the case of *Skidmore v. Swift & Co.*, 136 Fed. (2d) 112, cited in Appellee's Brief, pages 13, 15 and 16, the plaintiffs voluntarily spent several hours during the weeks at the fire hall in order to be available in case of an alarm but time so spent was irregular, and in addition to their regular hours of employment.

Such overtime was apparently gratuitous as they had no specific duties to perform except to answer an alarm and which occurred only rarely.

They were not under any responsibility or required to give any service that could be called "work" and were evidently paid for their regular hours of employment.

The case of *Brown v. Carter Drilling Co.*, 38 Fed. Supp. 489, Appellee's Brief, page 32, was that of a watchman employed to protect idle oil rigs from the elements, theft and pilfering and claimed to have been employed for 24 hours per day but the evidence showed that he only worked 14 hours per day and the idle rigs were not producing goods for commerce.

The distinguishing features of the case of *Gordon v. Paducah Ice Mfg. Co.*, 41 Fed. Supp. 950, Appellee's Brief 28, are that the employees were free to report or not to report as they wished and free to leave at any time they wished without discrimination and might return later for any work that was available.

It seems that the icing of refrigerator cars were separate jobs, that is to say, the men iced the cars that were ready for icing and when finished the men could leave the job or wait until another car was ready. The foreman picked his men from those present to service the car when it was ready and endeavored to spread the work with as many men as possible. (Page 984.)

The Appellee cites two mining cases where the lunch period was excluded from the hours worked but the facts in those cases are considerably different from the case at bar.

Mining as a general rule is not a continuous operation for 24 hours a day, like milling or smelting, but is usually for one or two shifts of eight hours each during a day and sometimes a lunch period is added onto the eight hours and blasting is usually performed during the lunch period or at the end of a shift as time must elapse after blasting to permit the smoke and fumes to be carried out of the mine by natural or forced ventilation. Miners, muckers, trammers, timbermen, and other employees could not immediately enter the places where blasting occurred or until the air was cleared. For such reasons the work of mining can readily be arranged so that it can be discontinued for a definite period so that all of the employees can eat their lunches at the same time. The services of the employees are generally suspended for such lunch periods so that mining is not as a rule analogous to the continuous operation of a mill such as operated by Appellee.

In the case of the *Tennessee Coal, Iron & R. Company v. Muscoda Local 123, et al.*, 40 Fed. Supp. 4-11, there were contracts between the unions and the companies and which excluded the lunch period. It also appears from the decision, page 7, that the miners went to work at 9:45 A.M. and worked to 3:15 P.M., a total of eight and one-half hours and that thirty minutes of that time was for a lunch period. Accord-

ingly under the agreements between the unions and the company, the lunch period of one-half hour was added on to the total hours worked and during which period the men were relieved of all duties. In the case of *Sunshine Mining Company v. Carver*, 41 Fed. Supp. 60, the trial Court reached its conclusion and based its decision upon the theory that one would not be working while he was eating his lunch or resting for he is not, at that time, rendering any service.

The facts in that case show that the company blasted during the lunch period and also provided tables and other conveniences for the men at some distance from where they were working and it was customary for the miners to retire to such places for the lunch and the men underground were allotted 35 minutes for their lunch period.

We believe that there is no analogy or comparison between the two cases cited above involving miners and the instant case for the obvious reason that the miners could not render any service to their employer while blasting was going on nor while they were eating lunch as their work consists of manual work by the use of their hands and they were relieved of all duties and responsibilities during that lunch period. On the other hand, the Appellants were rendering services to the Appellee during the time they were eating their lunch by keeping the mill running and the ore flowing so that the Appellee received the benefits from the continuing process without interruption.

AS TO APPELLEE'S ARGUMENT: WERE APPELLANTS DURING THEIR EMPLOYMENT BY APPELLEE ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT?

Counsel for Appellee devotes a considerable part of their brief in trying to substantiate the opinion of the District Court in the case of *Holland v. Haile Gold Mines, Inc.* (W.D., S.C.), 44 Fed. Supp. 641. The principles enunciated in that case by the trial judge holding that the shipments of gold by the mining company to the mint were administrative acts of the government and which did not constitute commerce within the meaning of the Fair Labor Standards Act and which opinion was concurred in by Judge Norcross upon the trial of the instant case, *Fox, et al. v. Summit King Mines, Limited*, 48 Fed. Supp. 952.

However, the Fourth Circuit Court of Appeals in the case of *Walling, Adm'r of Wage and Hour Division, U. S. Department of Labor, v. Haile Gold Mines, Inc.*, 136 Fed. Rep. (2d) 102, an action for injunction to restrain the Haile Gold Mines, Inc. (same company as above), from violating the provisions of the Fair Labor Standards Act, expressly overruled the propositions of law involved in the cases of *Holland v. Haile Gold Mines, Inc.*, and *Fox, et al. v. Summit King Mines, Inc.* (the instant case), that the shipment of gold by the mining company from one state to the U. S. Mint in another state was not an administrative act of the government but constituted interstate commerce for the reason that under the Gold Act, gold may also be

used for industrial, professional and artistic purposes, and also, for the reason that the power of exclusion from interstate commerce does not depend on the commercial nature of the article or the existence of competition.

Counsel for Appellee fails to refer to or discuss the opinion of the Eighth Circuit Court of Appeals in the case of *Canyon Corporation v. National Labor Relations Board*, 128 Fed. (2d) 953, referred to in our opening brief on pages 15 and 35, and which is to the same effect as the opinion of the Fourth Circuit Court of Appeals in the case of *Walling v. Haile Gold Mines, Inc.*, mentioned above.

CONCLUSION.

We believe the trial Court made erroneous findings of fact and conclusions of law by reasoning from the law of master and servant instead of applying the principles of law and declared policy of Congress applicable to the Statutory Act of Congress known as the Fair Labor Standards Act of 1938, and that the Court erroneously interpreted the Gold Reserve Act of 1934, and therefore the judgment of the trial Court should be reversed.

Dated, Reno, Nevada,
December 20, 1943.

Respectfully submitted,
MARTIN J. SCANLAN,
Attorney for Appellants.

7
No. 10639

14
United States
Circuit Court of Appeals
For the Ninth Circuit.

ALEXANDER CHASKIN, Doing Business as
Chaskin Citrus Co.,

Appellant,

vs.

HOWARD W. THOMPSON,

Appellee.

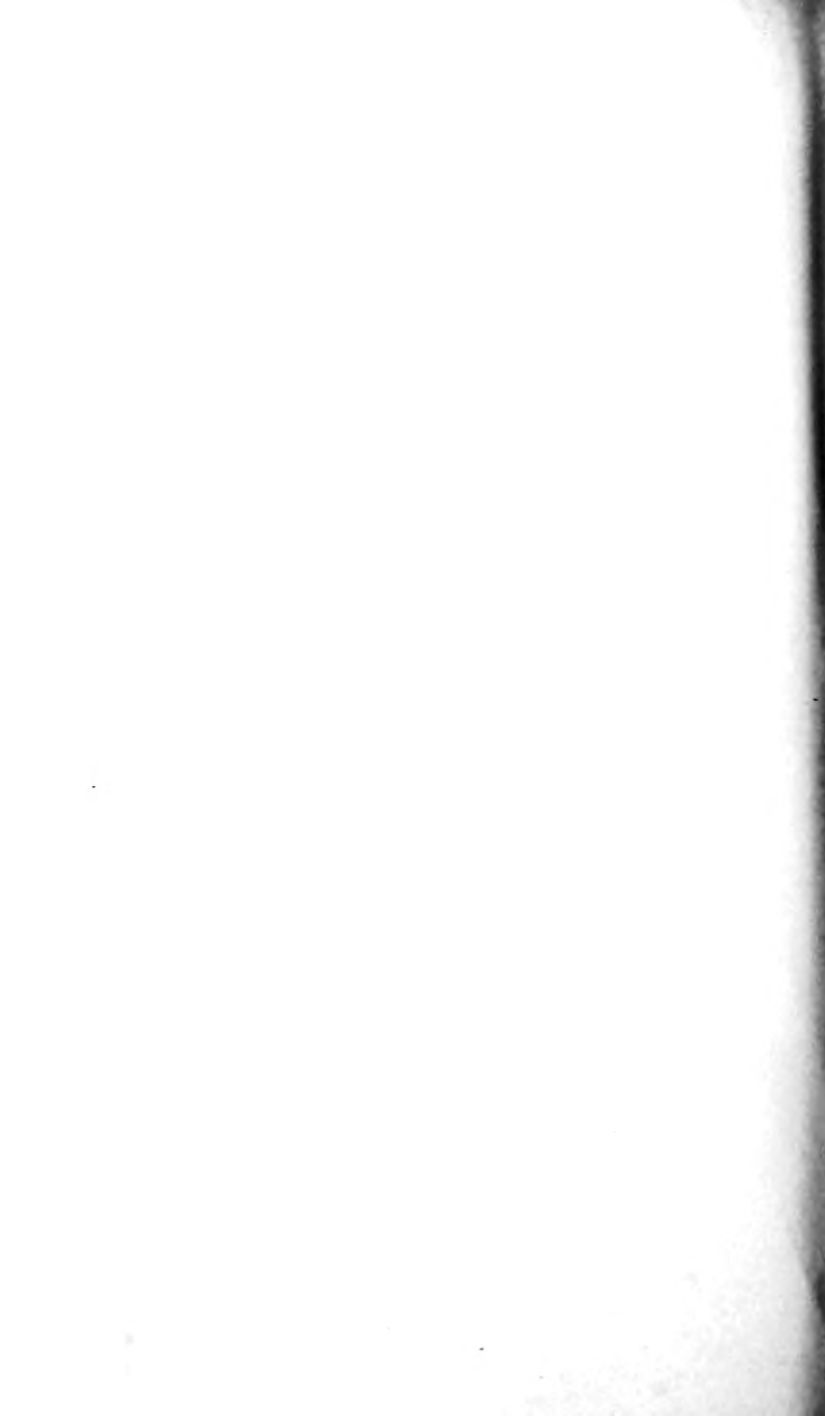
Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

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PAUL P. O'BRIEN,
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No. 10639

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALEXANDER CHASKIN, Doing Business as
Chaskin Citrus Co.,

Appellant,

vs.

HOWARD W. THOMPSON,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Superior Court of the State of California
In and For the County of Los Angeles

No. 487571

ALEXANDER CHASKIN, doing business as
CHASKIN CITRUS CO.,

Plaintiff,

vs.

HOWARD W. THOMPSON,

Defendant.

COMPLAINT

(Damages for Interference with Business)

Plaintiff complains of defendant and alleges:

I.

That at all times herein mentioned plaintiff was and now is a resident of the County of Los Angeles, State of California, and at all of said times plaintiff was and now is doing business under the firm name and style of Chaskin Citrus Co., with his principal place of business located in said County and State; that prior to the commencement of this action, plaintiff duly complied with the provisions of Sections 2466 and 2468 of the Civil Code of the State of California, by filing in the office of the County Clerk of said County a certificate stating his name in full and his place of residence, and stating further that he was doing business in California under the fictitious name of Chaskin Citrus Co., and by causing said certificate to be duly [2] published, and an affidavit showing such publication

to be duly filed, all in accordance with the provisions of said Sections.

II.

That at all of said times defendant was and now is a resident of the County of Los Angeles, State of California.

III.

That at all of said times plaintiff was and now is engaged in the business of buying and selling, at wholesale, citrus fruits grown in the State of California, including oranges; that in the course of said business plaintiff made and entered into contracts, agreements, and continuing business relations with packers of citrus fruit in said State to supply and sell oranges to him, and with brokers in said State to procure oranges for him, in order that he might resell the same to his customers at a profit.

IV.

That on or about the 2nd day of August, 1943, plaintiff had such contracts, agreements, and business relations with numerous packers and brokers of citrus fruit in the State of California to sell to and procure for him packed boxes of oranges, and plaintiff had numerous orders from customers to purchase such oranges from him at prices which would have netted him a very substantial profit.

V.

That on or about said date, and every day thereafter, defendant, knowing of the existence of said contracts, agreements, and business relations, wrong-

fully, unlawfully, and intentionally solicited said packers and brokers to breach their said contracts and agreements with plaintiff, and to terminate their said business relations with him, and wrongfully, unlawfully, and intentionally interfered with plaintiff's said business, and with plaintiff's rights under his said contracts, agreements and business relations, as hereinafter more particularly set forth.

[3]

VI.

That defendant called upon and communicated with said packers and brokers and sought to induce and coerce them to breach their then existing contractual and business relations with plaintiff, by falsely, fraudulently and maliciously stating and representing to such packers and brokers that as an employee of the United States Department of Agriculture he had the lawful power and authority to cause them, and each of them, to suffer great loss, injury and damage by causing priorities for farming and packing equipment, machinery, and supplies to be withheld from and denied to them, and by causing their gasoline rations to be curtailed and restricted, and by causing suits and proceedings to be brought against them for various penalties and forfeitures, whenever he chose so to do, and by stating, representing and threatening that he would exercise such pretended power and authority against them unless they breached their said contracts and agreements with plaintiff, and terminated their said business relations with plaintiff, and refrained from selling to plaintiff or procuring for him any oranges whatever.

VII.

That all of the foregoing was done by defendant for the purpose and with the intention of preventing plaintiff from obtaining supplies of oranges to fill the orders of plaintiff's customers, and of injuring and damaging plaintiff and bringing about the failure and destruction of plaintiff's said business.

VIII.

That by means of the said wrongful and unlawful acts, statements, and conduct, defendant did induce, intimidate, and coerce said packers and brokers to breach their said contracts and agreements with plaintiff, and to terminate their said business relations with him; that as the direct and proximate result thereof said packers and brokers did cancel and breach their said [4] contracts and agreements with plaintiff, and did refuse to comply with or fulfill the same, and did terminate and refuse to enter into or continue business relations with plaintiff, and did refuse to furnish, sell to or procure for plaintiff further supplies of oranges; that plaintiff was thereby prevented from purchasing or procuring approximately three hundred carloads of oranges which said packers and brokers had undertaken and agreed to sell to or procure for plaintiff, and which they would have sold to or procured for him, but for the said wrongful and unlawful interference on the part of defendant; and that by reason thereof plaintiff was unable to fill his customers' orders for said oranges, and plaintiff lost said business and the profits which he would have derived

and realized therefrom, and the good will attaching to plaintiff's said business was thereby injured and damaged, all to plaintiff's damage in the sum of \$50,000.00.

IX.

That when defendant made said false and fraudulent statements and representations to said packers and brokers, and threatened them as aforesaid, and thereby intimidated and coerced them to breach their contractual obligations with plaintiff and to refuse to enter into or continue their business relations with plaintiff, defendant well knew that he had no lawful right so to do, and defendant also well knew that plaintiff needed the oranges which said packers and brokers had contracted and agreed to sell to or procure for plaintiff in order to fill the orders of plaintiff's customers, and in order to conduct and carry on plaintiff's said business; that nevertheless, defendant, wrongfully, fraudulently, and maliciously desiring and intending to interfere with and disrupt plaintiff's said business, and to destroy the same, and thereby to cause plaintiff to suffer great loss, injury and damage, did all of the aforesaid acts and things, and pursued the aforesaid course of conduct, wilfully, fraudulently, oppressively, and maliciously, and [5] with reckless disregard for the rights of plaintiff; that by reason of the foregoing, plaintiff is entitled to recover from defendant, as exemplary and punitive damages, the additional sum of \$150,000.00.

Wherefore, plaintiff prays for judgment against defendant in the sum of \$50,000.00, actual damages,

and \$150,000.00, exemplary and punitive damages; for plaintiff's costs herein expended and incurred; and for such other and further relief as to the Court may seem meet and proper in the premises.

G. V. WEIKERT.

Attorney for Plaintiff.

State of California

County of Los Angeles—ss.

Alexander Chaskin being by me first duly sworn, deposes and says: that he is the Plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

ALEXANDER CHASKIN

Subscribed and sworn to before me this 17th day of August, 1943.

[Seal] ELEANOR SWAN

Notary Public in and for the County of Los Angeles, State of California

[Endorsed]: Filed Aug 17 1943 3:43 PM J. F. Moroney, County Clerk By L. Foster, Deputy.

[Endorsed]: Filed Oct 4, 1943 Edmund L. Smith, Clerk By John A. Childress, Deputy Clerk.

[6]

[Title of Superior Court and Cause.]

NOTICE AND MOTION AND PETN.
FOR REMOVAL

To Alexander Chaskin, Plaintiff, and G. V. Weikert, Esquire, his attorney:

Please Take Notice that Howard W. Thompson, the defendant in the above-entitled cause, by and through Charles H. Carr, United States Attorney, and Wm. W. Worthington, Assistant United States Attorney, will, on the 7th day of September, 1943, file in the Superior Court of the State of California, in and for the County of Los Angeles, and in the Clerk's office thereof in which said suit is now pending, his petition and bond for the removal of said suit and cause from said court to the United States District Court for the Southern District of California, Central Division, and that on the 14th day of September, 1943, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, said petition and bond will be called up for hearing and disposition [7] before the Law and Motion Department of said state court, at which time and place you may be present.

Dated: September 6, 1943.

CHARLES H. CARR,

United States Attorney.

WM. W. WORTHINGTON,

Assistant U. S. Attorney.

By: WM. W. WORTHINGTON

Attorneys for Defendant [8]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL

Comes Now the above-named defendant, by and through Charles H. Carr, United States Attorney, and Wm. W. Worthington, Assistant United States Attorney, and presents this his Petition for the removal of the above-entitled cause to the United States District Court for the Southern District of California, Central Division, and in his behalf respectfully shows:

I.

That Charles H. Carr, United States Attorney and Wm. W. Worthington, Assistant United States Attorney, have been authorized and directed by the Attorney General of the United States to so appear for and on behalf of the above-named defendant.

II.

That said defendant herein was at all time mentioned in plaintiff's Complaint herein, and still is, Field Representative of the Secre- [9] tary of Agriculture of the United States of America, and Field Representative of the Fruit and Vegetable Branch of the Food Distribution Administration of the War Food Administration, an instrumentality and agency of the United States, engaged in the exercise of federal governmental duties and powers; and that said War Food Administration is and was at all of the times mentioned in said plaintiff's Complaint, and herein mentioned, existing under and by virtue of an Executive Order of the President of

the United States of America, issued the 5th day of December, 1942, being Executive Order No. 9280, for the purpose and intent set forth therein.

III.

That the above-entitled action is of a civil nature and is brought to recover alleged damages for alleged interference with plaintiff's business on the ground that, among others, the defendant falsely, fraudulently, and maliciously stated and misrepresented his powers as an employee of the United States Department of Agriculture.

IV.

That said above-entitled action is one arising under the laws and the Constitution of the United States of America, in that said defendant is an officer of the United States; and in all of the matters set forth in plaintiff's Complaint herein, acting for and on behalf of the United States, particularly requiring construction and interpretation of:

1. First War Powers Act of 1941, Act December 18, 1941, C. 593; 55 Stat. 838; Title 50, U.S.C.A., Sec. 601, et seq.;
2. Title I of an Act of Congress approved May 12, 1933 (48 Stat. 31, 7 U.S.C.A. 601, et seq.) as amended May 9, 1934 (48 Stat. 672) and August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, approved [10] June 3, 1937 (50 Stat. 246, 247); and

3. Executive Order No. 9280, issued December 5, 1942.

V.

That the amount in controversy at the commencement of this action and at the present time exceeds the sum or value of Three Thousand Dollars (\$3,000), exclusive of interest and costs.

VI.

That the time within which the petitioner is required by the laws of this state, and the rules and orders of this court, to answer, demur, or otherwise plead to the Complaint herein has not yet expired.

VII.

Petitioner presents herewith a bond conditioned that he will enter in the District Court of the United States for the Southern District of California, Central Division, within thirty days from the date of filing of this petition, a certified copy of the record in this suit, and that he will pay all costs that may be awarded by said district court in case said court shall hold that this suit was wrongfully or improperly removed thereto.

VIII.

That prior to the filing of this petition and of said bond for the removal of this cause, written notice of the intention to file the same was given by petitioner to the plaintiff as required by law, a true copy of which, with proof of service of the same, is attached hereto.

IX.

That the above-entitled action or suit is now pending in this court.

Wherefore, Petitioner Prays:

That said bond may be accepted as good and sufficient, and that this court will make its Order for the removal of said cause into [11] the District Court of the United States for the Southern District of California, Central Division, pursuant to Title 28, United States Code, Sections 71 and 72, and cause the record herein to be removed to said District Court, and that no other or further proceedings may be had in said cause in this court.

Dated: September 7, 1943.

CHARLES H. CARR

United States Attorney

WM. W. WORTHINGTON

Assistant U. S. Attorney

Attorneys for Petitioner

By: WM. W. WORTHINGTON [12]

United States of America,
Southern District of California—ss.

Howard W. Thompson, being first duly sworn, deposes and says:

That he is the Petitioner above-named and is the defendant in the foregoing action;

That he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated to be alleged on in-

formation and belief, and as to those matters, he believes it to be true.

HOWARD W. THOMPSON

Subscribed and Sworn to before me this 7 day of September, 1943.

EDMUND L. SMITH, Clerk,

United States District Court,

By: JOHN A. CHILDRESS

[Seal]

Deputy [13]

POINTS AND AUTHORITIES

Points and Authorities To Sustain Defendant's Petition For Removal

I.

This case is one in which the United State District Courts have original jurisdiction, as it necessarily involves the powers and authorities of an officer and/or employee of the United States Government, purporting to have acted within the scope of such official position. It is, therefore, necessary to interpret and construe federal law to determine whether or not defendant herein had such power and authority; more particularly:

1. War Powers Act of 1941;
2. Title 7, U. S. C., Section 601 et seq.; and
3. Executive Order No. 9280, issued December 5, 1942.

II.

This case, therefore, is one arising under the Constitution and the Laws of the United States of America, and as such, is removable upon petition of the defendant to the United States District Court.

Feibelman v. Packard, 109 U.S. 421, 27 L. Ed. 984;

Title 28, United States Code, Sections 71 and 72;

Cox v. New Hampshire, 312 U. S. 569;

Wood v. Drake, 70 Fed. 881;

Winters v. Drake, 102 Fed. 545;

Scott v. Railroad Company, 112 Fed. 180.

Received copy of the within Notice and Petition for Removal and Bond this 7th day of September, 1943. G. V. Weikert, Attorney for Plaintiff.

[Endorsed]: Filed Sep 7 2:50 PM 1943 J. F. Moroney, County Clerk By M. Enfield, Deputy.

[Endorsed]: Filed Oct 4, 1943 Edmund L. Smith, Clerk By John A. Childress, Deputy Clerk.
[131½]

[Title of Superior Court and Cause.]

BOND ON REMOVAL OF CAUSE

Know All Men By These Presents:

That Howard W. Thompson, as Principal, and the Commercial Casualty Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and doing business in the State of California pursuant to the laws thereof, and authorized by the laws of the State of California to become surety on bonds of undertaking in said state, as surety, are held and firmly bound unto Alexander Chaskin dba Chaskin

Citrus Co., plaintiff in said action, in the sum of Five Hundred And No/100 Dollars (\$500.00) lawful money of the United States, to be paid to the said plaintiff, their successors or assigns; for which payment, well and truly to be made, said undersigned, jointly and severally bind themselves, their successors and assigns, firmly by these presents.

Sealed with our seals and dated this 7th day of September, 1943.

The Condition of the above obligation is such that:

Whereas, said defendant has applied by Petition to the above Superior Court of the State of California in and for the County of Los Angeles for the removal of the above entitled action therein pending unto the District Court of the United States, in and for the Southern District of California, Central Division, as provided by law;

Now, Therefore, if said Defendant shall enter in said District Court of the United States, in and for Southern District of California, Central Division, within thirty (30) days from the date of the filing of said Petition, a certified copy of the record of said action, and shall pay all costs that may be awarded therein by said District Court of the United States, in and for the Southern District of California, Central Division, if said District Court shall hold that said action was wrongfully or improperly removed thereto, then this obligation shall

be void; otherwise, it shall be and remain in full force and effect.

(Signed) HOWARD W. THOMPSON
COMMERCIAL CASUALTY
INSURANCE COMPANY

By:

Attorney-in-Fact

Approved this 10th day of Sept., 1943, H. C. Shepherd, Court Commissioner of Los Angeles County.

Copy

WWW-ADA

State of California

County of Los Angeles—ss.

On this 7th day of September in the year One Thousand Nine Hundred and forty-three before me, Gladys E. Metcalf, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Helen A. Vanderpluym known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Commercial Casualty Insurance Company (a corporation) and acknowledged to me thathe subscribed the name of said Corporation thereto as surety and *his* own name as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the

said County of Los Angeles, the day and year in this certificate first above written.

[Seal] GLADYS E. METCALF

Notary Public in and for the County of Los Angeles, California.

My Commission expires October 28, 1946.

[Endorsed]: Filed Sep 7-1943 J. F. Moroney,
County Clerk, By M. B. Hershide, Deputy.

[Endorsed]: Filed Oct. 4, 1943 Edmund L.
Smith, Clerk By John A. Childress, Deputy Clerk.
[14]

[Title of Superior Court and Cause.]

DEMURRER

Defendant demurs to plaintiff's Complaint on the following grounds:

I.

The Complaint does not state facts sufficient to constitute a cause of action.

Dated: September 10, 1943.

CHARLES H. CARR

United States Attorney

WM. W. WORTHINGTON

Assistant U. S. Attorney

By: WM. W. WORTHINGTON

Attorneys for Defendant.[15]

I Hereby Certify that this Demurrer is filed in good faith; and is not filed for the purpose of delay, and in my opinion the grounds are well-taken.

WM. W. WORTHINGTON [16]

Points and Authorities to Sustain Defendant's
Demurrer

The ground of defendant's Demurrer herein is that provided by Section 430 of the California Code of Civil Procedure.

I.

The state courts take judicial notice of federal statutes.

Daggett v. Colgan,

92 Cal. 53; 28 Pac. 51.

Spokane Falls etc. R. Co., v. Zieler,

167 U. S. 65; 42 L. Ed. 79,

II.

Plaintiff's Complaint fails to state a cause of action, because by federal law, defendant herein had the power to do each and every of the things alleged by the plaintiff as being false and fraudulent.

First and Second War Powers Act.

Title 7, U. S. C. A., Sec. 601, et seq.

Executive Order No. 9280.

III.

A federal official is not responsible because he may have acted maliciously, if he had authority and power to perform the act.

Vilas v. Spaulding, 161 U. S. 483.

Cooper v. O'Connor, 99 F.(2d) 135.

Booth v. Fletcher, 101 F.(2d) 676.

Jones v. Kennedy, 121 F.(2d) 40.

Adams v. Home Owners Loan Corporation,
107 F(2d) 139.

IV.

Plaintiff's Complaint wholly fails to reveal that if plaintiff had purchased 300 carloads of oranges, as alleged in paragraph VIII of his Complaint, that he would have been able to have sold them, or any part thereof, without violating the federal law, whereas in truth and [17] in fact plaintiff well knew said oranges could not be sold within the state of California, and that a sale in interstate commerce or commerce with Canada would be a violation of federal law.

Title 7, U. S. C. A., Sec. 601, et seq.

Order No. 66, being an order "Regulating the Handling of Oranges Grown in the State of California and in the State of Arizona", promulgated by the Secretary of Agriculture of the United States.

Copy of within demurrer & points & authorities received this 10th day of September, 1943. G. B. Weikert, Attorney for Plaintiff.

[Endorsed]: Filed Sep 10 4:01 PM 1943 J. F. Moroney, County Clerk By M. Enfield, Deputy.

[Endorsed]: Filed Oct. 4, 1943 Edmund L. Smith, Clerk By John A. Childress Deputy Clerk.

[18]

[Title of Superior Court and Cause.]

PLAINTIFF'S ANSWER AND OBJECTIONS
TO PETITION FOR REMOVAL TO FEDERAL COURT

Comes Now the above named plaintiff, and for answer to the defendant's Petition for Removal of the above entitled cause to the Federal Court, and as grounds of objection to the filing, presentation or acceptance thereof, or of the bond presented therewith, alleges as follows:

I.

Plaintiff alleges that he has no information or belief sufficient to enable him an answer any of the allegations contained in paragraphs I and II of said Petition for Removal, and on that ground denies each and all of the allegations therein.

II.

Plaintiff denies, generally and specifically, each and all of the allegations contained in paragraph IV of said Petition for Removal.

III.

That said Petition for Removal does not state facts [19] sufficient to constitute grounds for removal.

IV.

That this action is between two individuals, residents of the State of California, and is not brought against an officer of the United States, and is not one arising under the Constitution, laws or treaties

of the United States, within the meaning of Section 28 of the Judicial Code of the United States, and is not a proper case for removal to the Federal Court.

V.

That the United States District Court is without jurisdiction to entertain this action.

Wherefore, plaintiff prays that said Petition for Removal be denied and dismissed; that the bond presented with said Petition be not accepted; that the above entitled Court retain jurisdiction of the above entitled action; and for such other and further relief as may be meet and proper in the premises.

Dated: September 13, 1943.

G. V. WEIKERT,

Attorney for Plaintiff.

State of California

County of Los Angeles—ss.

Alexander Chaskin being by me first duly sworn, deposes and says: that he is the Plaintiff in the above entitled action; that he has read the foregoing Plaintiff's Answer and Objections to Petition for Removal to Federal Court, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

ALEXANDER CHASKIN

Subscribed and sworn to before me this 13th day of September, 1943.

[Seal] ELEANORE SWAN

Notary Public in and for the County of Los Angeles, States of California.

Received copy of the within answer this 14 day of Sept. 1943.

CHAS. H. CARR,

U. S. Atty.

WM. W. WORTHINGTON,

Asst. U. S. Atty.

Attorney for defendant.

[Endorsed]: Filed Sep 14 1943 J. F. Moroney,
County Clerk By J. D. John, Deputy.

[Endorsed]: Filed Oct. 4, 1943 Edmund L.
Smith, Clerk, By John A. Childress. [20]

In the Superior Court of the State of California
In and For the County of Los Angeles
Honorable Alfred L. Bartlett, Judge Presiding;
Department No. 35. September 14, 1943

[Title of Cause.]

No. 487571

CERTIFIED COPY OF MINUTE ORDER

(Entered September 16, 1943)

Petition and bond of defendant Howard W.
Thompson for removal to United States District

Court, Southern District of California, Central Division, comes on for hearing; G. V. Weikert appearing as attorney for the plaintiff and Charles H. Carr, United States Attorney and William W. Worthington Assistant United States Attorney for the defendant. Said petition is denied.

[Endorsed]: Filed Oct 4, 1943. [21]

In the Superior Court of the State of California
In and For the County of Los Angeles

Honorable Alfred L. Bartlett, Judge Presiding;

Department No. 35

September 16, 1943

[Title of Cause.]

No. 487571

CERTIFIED COPY OF MINUTE ORDER

(Entered September 20, 1943)

Demurrer of defendant to complaint comes on for hearing. Demurrer is overruled; defendant is given ten days to answer.

[Endorsed]: Filed Oct. 4, 1943. [22]

CERTIFICATE OF CLERK OF SUPERIOR
COURT FOR COUNTY OF LOS ANGELES

No. 487571

State of California

County of Los Angeles—ss.

I, J. F. Moroney, County Clerk and Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents consisting of the Complaint, Notice of filing and hearing petition and Petition for Removal, Bond on Removal, Demurrer, Answer and objections to petition for removal, Minute Order of September 14, 1943, denying petition for removal to the United States District Court, Southern District of California (Central Division), and Minute Order of September 16, 1943, in re demurrer, in the action of Alexander Chasking, doing business as Chaskin Citrus Co., vs Howard W. Thompson, to be a full, true and correct copy, to date, of all of the original documents on file and/or of record in this office in the above-entitled action and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 4th day of October, 1943.

[Seal] J. F. MORONEY,

County Clerk and Clerk of the Superior Court of
the State of California, in and for the County
of Los Angeles,

By F. P. CHRISMAN,
Deputy.

[Endorsed]: Filed Oct 4-1943. [23]

In the District Court of the United States
In and For the Southern District of California

Central Division

No. 3203 Y

ALEXANDER CHASKIN, doing business as
Chaskin Citrus Co.,

Plaintiff,

vs.

HOWARD W. THOMPSON,

Defendant.

PETITION

To the Honorable Judges of the United States District Court, for the Southern District of California, Central Division:

Your Petitioner respectfully shows:

I.

Petitioner is the defendant in the above-entitled cause.

II.

The above suit was commenced in the Superior Court of the State of California, in and for the County of Los Angeles, on the 17th day of August, 1943.

III.

Petitioner filed a petition and bond for the removal of this cause to this court from said state court on the 7th day of September, [24] 1943, within the time provided for by the federal statute,

and also served upon plaintiff's attorney notice of the filing of said petition and bond.

IV.

On the 15th day of September, 1943, the Judge of said state court made and entered an Order in said cause denying said Petition For Removal.

V.

Petitioner filed in this court on the 4th day of October, 1943, a certified transcript of the record and proceedings in said state court, all within the thirty days provided by statute.

VI.

That the defendant's time to answer herein in said state court in said cause has been extended by stipulation to and including the 6th day of October, 1943. That the attorney for the plaintiff, G. V. Weikert, Esquire, has advised Wm. W. Worthington, Assistant United States Attorney, one of the attorneys for the defendant herein, that it is the purpose and intent of the plaintiff herein to prosecute said action in the State court to final judgment.

Wherefore, Petitioner Prays:

That an Order be made and entered staying all proceedings in said state court until further order from this court.

Dated: October 4th, 1943.

CHARLES H. CARR

United States Attorney

JAMES L. CRAWFORD

WM. W. WORTHINGTON

By: WM. W. WORTHINGTON

Attorneys for Petitioner [25]

AFFIDAVIT

United States of America

Southern District of California—ss.

Wm. W. Worthington, being first duly sworn,
deposes and says:

That he has read the foregoing petition and knows the contents thereof and that the same is true to his own knowledge except as to those matters therein alleged upon information and belief; and that as to those he believes it to be true. This verification is made by deponent as one of the attorneys of the defendant herein as the defendant is not within the State of California but is in Washington, D. C.

WM. W. WORTHINGTON

Subscribed and Sworn to before me this 4th day
of October, 1943.

EDMUND L. SMITH,

Clerk

United States District Court

Southern District of California

[Seal] By: JOHN A. CHILDRESS

Deputy.

Received copy of the within Order to Show Cause
& Petition this 5th day of October, 1943.

G. V. WEIKERT,

Attorney for.....

[Endorsed]: Filed Oct. 5, 1943. [26]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

To Alexander Chaskin and G. V. Weikert, Esquire,

Sirs:

On the Summons and Complaint, Petition For Removal, Bond on Removal and Notice thereof, and on the Petition of Howard W. Thompson, hereto annexed, verified the 4th day of October, 1943, and it appearing to the Court that the removal of this cause to the United States District Court for the Southern District of California, Central Division from the Superior Court of the State of California, in and for the County of Los Angeles has been denied; that the prosecution of said cause may or will be continued in said state court or that a judgment of default may be entered against the defendant herein on or after the 6th day of October, 1943, which will cause the defendant irreparable injury,

[27]

It Is Ordered that the plaintiff appear in this court before me at my chambers on the second floor of the Federal Building, in the City of Los Angeles, State of California, on the 6th day of Octo-

ber, 1943, at 2:00 o'clock in the afternoon of that day, and show cause why plaintiff, his attorney and agents, and each of them, should not be specifically restrained and enjoined from prosecuting any further proceedings or taking any steps in the Superior Court of the State of California, County of Los Angeles, in the action entitled Alexander Chaskin, etc., Plaintiff, v. Howard W. Thompson, Defendant, No. 487,571.

Service of this Order on the plaintiff or his attorney, G. V. Weikert, shall be made not later than 2:00 o'clock p. m., the 5th day of October, 1943.

Dated: October 4, 1943

LEON R. YANKWICH

United States District Judge.

[Endorsed]: Filed Oct 5, 1943. [28]

[Title of District Court and Cause.]

ORDER

It appearing to the Court that Order To Show Cause in the above-entitled matter is now returnable at 2:00 o'clock p. m., October 6, 1943,

It Is Hereby Ordered that said Order be, and the same hereby is, returnable the 18th day of October, 1943, at 2:00 o'clock p. m. in the court room of the Honorable Leon R. Yankwich, Federal Building, Los Angeles, California.

LEON R. YANKWICH

United States District Judge

[Endorsed]: Filed Oct. 6, 1943. [29]

[Title of District Court and Cause.]

NOTICE OF MOTION TO REMAND

To the Defendant, Howard W. Thompson, and to His Attorneys, Charles H. Carr, United States Attorney, and James L. Crawford and William W. Worthington, Assistant United States Attorneys:

You, and each of you, will please take notice that on the 18th day of October, 1943, at 2:00 o'clock P. M., in the courtroom of the Honorable Leon R. Yankwich, United States District Judge, in the Federal Building, in the City of Los Angeles, State of California, the plaintiff, Alexander Chaskin, doing business as Chaskin Citrus Co., appearing specially for the purposes of this motion only, saving and reserving any and all objections which he has to the irregularities and imperfections in the mode, manner, and method of the removal papers, and expressly denying that this Court has jurisdiction of this cause, or of the plaintiff therein, [30] will move this Court to remand this cause to the Superior Court of the State of California, in and for the County of Los Angeles, from whence it was removed contrary to the order of said Superior Court denying removal.

Said motion will be made upon the grounds that this Court has no jurisdiction to hear and determine this cause; that it appears upon the face of the record herein that this cause is not one arising under the Constitution, laws or treaties of the United

States, within the meaning of Section 28 of the Judicial Code of the United States, and is not one within the original jurisdiction of this Court; and hence that this Court has no jurisdiction of this action or of the parties to this suit under said attempted removal.

Said motion will be based upon this Notice of Motion, and upon all the files, records, proceedings and papers in this action.

Dated: October 14, 1943.

G. V. WEIKERT

Attorney for Alexander Chas-
kin, doing business as Chas-
kin Citrus Co. [31]

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
MOTION TO REMAND

Whether a case is removable or not as arising under the laws of the United States is to be determined by the allegations of the plaintiff's complaint or petition, and if the case does not thus appear to be removable it cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant.

28 U.S.C.A. Sec. 71, Note 221;

Tennessee v. Union etc. Bank, (1894) 152
U.S. 454;

Chappell v. Wentworth, 155 U.S. 102;
Mountain View M. & M. Co. v. McFadden,
180 U.S. 533;
Minnesota v. Northern Securities Co., 194
U.S. 48;
American Well Works Co. v. Layne etc. Co.,
241 U.S. 257;
Great Northern R. Co. v. Alexander, 246 U.S.
276;
Great Northern R. Co. v. Galbreath Cattle
Co., 271 U.S. 99; [32]
Gully v. First Nat. Bank, (1936) 299 U.S.
109.

“The rule has frequently been laid down that to render an action removable to a federal court, under this section, it is necessary that it could have been originally brought in the federal court.”

28 U.S.C.A. Sec. 71, Note 73, (Citing many cases)

“The only ground of jurisdiction which is or can be suggested is that the suit was one arising under the Constitution and the laws of the United States. * * * * It is the settled interpretation of these words, as used in this statute conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough, as the law now exists, that it appears that the defendant may find in the constitution or laws of the United States some ground of defense.

(Citing cases). If the defendant has any such defense to the plaintiff's claim, it may be set up in the state courts, and if properly set up, and denied by the highest court of the state, may ultimately be brought to this court for decision.

"It is well settled that the entry of a federal question into a case by way of defense, although it may present the controlling or the only disputed question, does not justify removal under section 28 of the Judicial Code."

In Re Winn, 213 U.S. 458.

"We consider it well settled that a cause of action does not arise under federal laws so as to justify removal, unless the plaintiff's right, to enforce which the suit is brought, arises out of and depends upon those laws, so that both in stating and in proving his case he must show that his right to recover stands upon the federal law; and that, even [33] though his complaint may disclose that the case will turn upon and be ruled by the construction and effect given to some federal law under which the defendant is claiming, the federal jurisdiction will fail." (Citing *Tennessee Union Bk.*, 152 U.S. 454, 459, 461, and other cases.)

Venmer v. N.Y. Cent. R. Co., (C.C.A. 6) 293 F 373, 374.

For a case involving a somewhat similar set of facts, see *Walker v. Collins*, 167 U.S. 57, where an action was brought in a state court for damages for an unlawful seizure of plaintiff's goods and chattels, and the answer of the defendants averred that

during the times mentioned in the complaint the defendants were, respectively, a marshal of the United States and his deputies and that the seizure was under authority of an order of attachment issued out of the federal court; and it was held that the case was not removable on the ground of a federal question, as such question did not appear from the plaintiff's pleading.

That the defendant is an officer of the United States, and claims to have been acting under an act of Congress in doing the acts complained of, does not authorize removal.

City of Stanfield v. Umatilla River Water Users Assn. 192 F. 596.

Peoples U.S. Bank v. Goodwin, 160 F. 727.

The mere fact that a defendant sued for malicious prosecution was an agent in the employment of the Post Office Department did not give him the right of removal.

4 Op. Atty. Gen. 300.

Where the State court denied removal and the defendant filed a petition in the Federal court to enjoin the plaintiff from proceeding further, a motion by plaintiff to remand was held to be the proper procedure. [34]

Bley v. Travelers Insurance Co., 27 F. Sup. 351.

Respectfully submitted,

G. V. WEIKERT

Attorney for Alexander Chaskin,
doing business as Chaskin
Citrus Co.

Due Service is Admitted of the within Notice of Motion to Remand, this 15th day of October, 1943.

CHARLES H. CARR,

United States Attorney,

By WM. W. WORTHINGTON,

Assistant United States

Attorney,

Attorneys for Defendant.

[Endorsed]: Filed Oct 15, 1943. [35]

At a stated term, to wit: The September Term, A. D. 1943 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 18th day of October in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Leon R. Yankwich, District Judge

No. 3203-Y-Civil

ALEXANDER CHASKIN, doing business as
CHASKIN CITRUS CO.,

Plaintiff,

vs.

HOWARD W. THOMPSON,

Defendant.

ORDER GRANTING PETITION FOR RESTRAINING ORDER

This cause coming on for hearing on return of order of October 5, 1943, to plaintiff to show cause why a restraining order should not issue, restraining plaintiff from proceeding further in the Superior Court of the State of California in action 487571; and hearing on motion of plaintiff to remand cause to Superior Court of the State of California; G. V. Weikert, Esq., appearing as counsel for plaintiff; Wm. W. Worthington, Esq., Assistant U. S. Attorney, appearing for the defendant; James Marquardt, Court Reporter, being present and reporting the proceedings:

Attorney Weikert presents motion. Attorney Worthington replies.

The Court states complaint states a cause of action under color of office, and grants restraining order.

The prayer of the petition is granted and restraining order granted.

Motion to remand is denied. [36]

[Title of District Court and Cause.]

ORDER DENYING MOTION TO REMAND

A Motion To Remand the above-entitled case to the Superior Court of the State of California, County of Los Angeles, having duly come on for hearing before the Honorable Leon R. Yankwich, United States District Judge, in his court room in the Federal Building, Los Angeles, California, at the hour of 2:00 o'clock p. m. on the 18th day of October, 1943, and the Court after hearing G. V. Weikert, Esquire, attorney for plaintiff on behalf of said Motion, and Wm. W. Worthington, Assistant United States Attorney, in opposition thereto, and the Court being fully advised in the premises and due consideration having been given to the matter.

It Is Ordered that said Motion To Remand the above-entitled [40] cause to the Superior Court of the State of California, County of Los Angeles, be, and the same is hereby, in all respects denied.

Dated: October 22, 1943.

LEON R. YANKWICH

United States District Judge

Approved as to form according to Rule 8.

.....
G. V. Weikert,
Attorney for plaintiff.

Received copy of the within Proposed Order this 20th day of Oct., 1943.

G. V. WEIKERT,

Attorney for Plaintiff.

[Endorsed]: Filed Oct. 22, 1943. [41]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

An Order to Show Cause why an injunction should not be granted herein against the defendant Alexander Chaskin, his attorney G. V. Weikert, Esquire, and said Chaskin's agents, having duly and regularly come on for hearing on the 18th day of October, 1943, and argument having been had by the respective parties hereto, and the court being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law in said cause:

FINDINGS OF FACT

I.

This action is brought by the plaintiff against the defendant herein for damages. Plaintiff and defendant are each residents of the City and County of Los Angeles, State of California. [42]

II.

The above suit was commenced in the Superior Court of the State of California, in and for the County of Los Angeles on the 17th day of August, 1943.

III.

The defendant herein filed a Petition and Bond for the removal of this cause to the United States District Court for the Southern District of California, on the 7th day of September, 1943, and

within the time provided for by the federal statute, and also served upon plaintiff's attorney notice of the filing of said Petition and Bond.

IV.

On the 15th day of September, 1943, Honorable Alfred Bartlett, Judge of said state court, made and entered an Order in said cause denying said Petition for removal.

V.

The defendant herein filed in this court on the 4th day of October, 1943, a certified transcript of the record and proceedings aforesaid in said state court, all within the thirty days provided by statute.

VI.

That a Motion To Remand said cause to said state court was duly brought on for hearing in this court on the 18th day of October, 1943, by plaintiff, which was denied.

VII.

The Complaint of the plaintiff herein alleges, among other things, as follows, to-wit:

“That defendant called upon and communicated with said packers and brokers and sought to induce and coerce them to breach their then existing contractual and business relations with plaintiff, by falsely, fraudulently and maliciously stating and representing to such packers and brokers that as an employee of the United States Department of [43] Agriculture he had the lawful power and authority to cause them, and each of them, to suffer great loss,

injury and damage by causing priorities for farming and packing equipment, machinery, and supplies to be withheld from and denied to them, and by causing their gasoline rations to be curtailed and restricted, and by causing suits and proceedings to be brought against them for various penalties and forfeitures, whenever he chose so to do, and by stating, representing and threatening that he would exercise such pretended power and authority against them unless they breached their said contracts and agreements with plaintiff, and terminated their said business relations with plaintiff, and refrained from selling to plaintiff or procuring for him any oranges whatever."

CONCLUSIONS OF LAW

As conclusions of law under the provisions of law applicable to the foregoing Findings of Fact, the Court concludes as follows:

I.

That it has jurisdiction over all the parties and subject matter.

II.

That the defendant is entitled to a permanent injunction restraining and enjoining the plaintiff, his agents, and his attorney G. V. Weikert, Esquire, and each of them from prosecuting any further proceedings or taking any steps in the Superior Court of the State of [44] California, in and for the County of Los Angeles, in the action entitled Alexander Chaskin, etc., plaintiff, v. Howard W. Thompson, defendant, No. 487571.

Dated: November 1, 1943.

LEON R. YANKWICH

United States District Judge

Presented by:

CHARLES H. CARR

United States Attorney

JAMES L. CRAWFORD

WM. W. WORTHINGTON

Assistant U. S. Attorneys

By: WM. W. WORTHINGTON

Attorneys for Defendant.

Approved as to form according to Rule 8.

.....
G. V. Weikert,
Attorney for plaintiff.

Received copy of the within proposed Findings of
Fact and Conclusions of Law this 22d day of Oct.,
1943.

G. V. WEIKERT,

Attorney for Plaintiff.

[Endorsed]: Filed Nov. 1, 1943. [45]

In the District Court of the United States
In and For the Southern District of California

Central Division

No. 3203-Y Civil

ALEXANDER CHASKIN, doing business as
Chaskin Citrus Co.,

Plaintiff,

vs.

EDWARD W. THOMPSON,

Defendant.

DECREE OF INJUNCTION

An Order To Show Cause why plaintiff, his attorney and agents, and each of them, should not be specifically restrained and enjoined from prosecuting any further proceedings or taking any steps in the Superior Court of the State of California, in and for the County of Los Angeles, in the action entitled Alexander Chaskin, etc., plaintiff, v. Howard W. Thompson, defendant, No. 487571, having come on for hearing before the Honorable Leon R. Yankwich, United States District Judge, in his courtroom in the Federal Building, Los Angeles, California, at 2:00 o'clock p. m. on the 18th day of October, 1943, and after hearing Wm. W. Worthington, Assistant United States Attorney, on behalf of said Order, and G. V. Weikert, Esquire, attorney for plaintiff, in opposition thereto, and the Court being fully advised in the premises and due

consideration having been given to the matter, and it appearing to the court that: [46]

(a) Plaintiff has filed an action for damages against defendant in the Superior Court of the State of California, in and for the County of Los Angeles, on the 17th day of August, 1943, and

(b) Defendant duly filed his petition and bond for removal of said action from said state court to this court on the 7th day of September, 1943, and that due notice thereof was given to plaintiff and said state court, and

(c) On the 4th day of October, 1943, a certified transcript of the record and proceedings in said action in said state court were filed in the office of the Clerk of the United States District Court for the Southern District of California, Central Division, and

(d) This court now has jurisdiction of said action, and plaintiff, his agents and attorneys should not be allowed to proceed in said state court action.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that plaintiff herein, Alexander Chaskin, and G. V. Weikert, Esquire, his attorney, and agents of said Alexander Chaskin, and each of them, be, and they are hereby, restrained and enjoined from prosecuting any further proceedings or taking any steps in the Superior Court of the State of California, in and for the County of Los Angeles, in the action entitled Alexander Chaskin, etc., plaintiff, v. Howard W. Thompson, defendant, No. 487571.

Dated: November 1, 1943.

LEON R. YANKWICH

United States District Judge

Approved as to form according to Rule 8.

.....

G. V. Weikert,
Attorney for plaintiff.

Judgment entered Nov. 1, 1943. Docketed Nov. 1,
1943 C. O. Book 21, Page 668.

EDMUND L. SMITH,

Clerk,

By LOUIS J. SOMERS,

Deputy.

Recieved copy of the within proposed decree of
injunction this 25th day of Oct., 1943.

G. V. WIEKERT,

Attorney for Plaintiff.

[Endorsed]: Filed Nov. 1, 1943. [47]

—

[Title of District Court and Cause.]

WRIT OF INJUNCTION

United States of America,
Southern District of California,
Central Division.—ss.

The President of the United States of America to
Alexander Chaskin, G. V. Weikert, his attor-
ney, and Agents of said Alexander Chaskin,

GREETINGS:

Whereas, the above-entitled action was commenced in the Superior Court of the State of California, in and for the County of Los Angeles, by the above-named plaintiff, Alexander Chaskin, by his attorney G. V. Weikert, and

Whereas, said action was transferred from said Superior Court to the District Court of the United States, in and for the Southern District of California, Central Division, and the above-named defendant, Howard W. [48] Thompson has obtained a Decree of Injunction, as heretofore filed in the office of the Clerk of the above-entitled court on the 1st day of November, 1943.

Now, Therefore, We, having regard to the matters in said Complaint of the plaintiff, and Petition for Removal of the defendant, contained and alleged, Do Hereby Command and Strictly Enjoin You, Alexander Chaskin, and you, G. V. Weikert, his attorney, and agents of said Alexander Chaskin, and each of you from prosecuting any further proceedings or taking any steps in the Superior Court of the State of California, in and for the County of Los Angeles, in the action entitled Alexander Chaskin, etc., plaintiff, v. Howard W. Thompson, defendant, No. 487571;

Whereof fail not under penalty of the law thence ensuing.

Witness the Honorable Leon R. Yankwich, Judge,
United States District Court, this 1st day of No-
vember, 1943.

[Seal]

EDMUND L. SMITH,

Clerk,

United States District Court,
Southern District of Califor-
nia.

By: JOHN A. CHILDRESS

Deputy.

(Affidavit of Service by Mail.)

[Endorsed]: Filed Nov. 1, 1943. [49]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Alexander Chaskin, doing business as Chaskin Citrus Co., plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the minute order made and entered in this action on October 18, 1943, granting the petition of the above named defendant for an order staying proceedings in said action in the Superior Court of the State of California in and for the County of Los Angeles and enjoining the above named plaintiff from prosecuting the same in said State court; and from the judgment or decree of injunction entered in this action on

November 1, 1943, and the write of injunction issued thereon.

G. V. WEIKERT

Attorney for Appellant.

Address: 818 Oviatt Building,

Los Angeles, California.

[Endorsed]: Filed & Mailed copy to Charles H. Carr, Attorney for Defendant Nov. 9, 1943, Edmund L. Smith, Clerk, By John A. Childress, Deputy Clerk. [51]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

The appellant hereby designates for inclusion in the record on appeal herein the complete record and all the proceedings in this action, including the minutes and minute order of October 18, 1943.

G. V. WEIKERT

Attorney for Appellant.

[Endorsed]: Received copy of the within Designation this 9 day of Nov., 1943. Chas. H. Carr, U. S. Attorney, Wm. W. Worthington, Asst. U. S. Attorney. Filed Nov. 15, 1943 Edmund L. Smith, Clerk, By John A. Childress, Deputy Clerk. [54]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 54 inclusive contain full, true and correct copies of: Complaint; Notice, Motion and Petition for Removal; Bond on Removal; Demurrer; Plaintiff's Answer and Objections to Petition for Removal to Federal Court; Minute Orders of Superior Court Entered September 16, 1943 and September 20, 1943; Petition; Order to Show Cause; Order; Notice of Motion to Remand; Minute Order Entered October 18, 1943; Answer; Order; Findings of Fact and Conclusions of Law; Decree of Injunction; Writ of Injunction and Affidavit of Service; Notice of Appeal; Cost Bond on Appeal; Designation of Record on Appeal which constitute the record on Appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for comparing, correcting and certifying the foregoing record amount to \$8.95 which sum has been paid to me by Appellant.

Witness my hand and the seal of said District Court this 16 day of December, 1943.

[Seal]

EDMUND L. SMITH,

Clerk

By THEODORE HOCKE

Deputy Clerk.

[Endorsed]: No. 10639 United States Circuit Court of Appeals for the Ninth Circuit. Alexander Chaskin, Doing Business as Chaskin Citrus Co., Appellant vs. Howard W. Thompson, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed December 18, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10639

ALEXANDER CHASKIN, doing business as
Chaskin Citrus Co.,

Plaintiff and Appellant,

vs.

HOWARD W. THOMPSON,

Defendant and Appellee.

APPELLANT'S STATEMENT AND DESIGNATION

Pursuant to Rule 19 of the Rules of the above entitled Court, the appellant herein states that the points on which he intends to rely on this appeal are as follows:

1. The United States District Court for the Southern District of California, Central Division

has no jurisdiction over the action, or over the parties thereto.

2. The said United States District Court had no jurisdiction to make or enter the order or the judgment appealed from.

3. The evidence is insufficient to support and does not support the findings of fact, or the conclusions of law, or the order or judgment of said United States District Court.

4. The findings of fact do not support the conclusions of law or the order or judgment of said United States District Court.

5. The conclusions of law do not support the order or judgment of said United States District Court.

6. The said United States District Court erred in denying appellant's motion to remand the cause to the Superior Court of the State of California in and for the County of Los Angeles.

And the appellant hereby designates the parts of the record which he thinks necessary for the consideration of the foregoing points, as follows:

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G. V. WEIKERT

Attorney for Appellant.

G. V. Weikert

Suite 818 Oviatt Building

617 South Olive Street

Los Angeles

TRinity 7722

Received Copy of the Within Appellant's Statement and Designation This 27 Day of December 1943.

CHARLES H. CARR

United States Attorney

Attorney for Defendant &

Appellee

[Endorsed]: Filed Dec. 31, 1943. Paul P. O'Brien, Clerk.

No. 10639

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALEXANDER CHASKIN, Doing Business as CHASKIN
CITRUS Co.,

Appellant,

vs.

HOWARD W. THOMPSON,

Appellee.

APPELLANT'S OPENING BRIEF.

FILED

FEB 14 1944

PAUL P. O'BRIEN,
CLERK

G. V. WEIKERT,
818 Oviatt Building, Los Angeles 14,
Attorney for Appellant.

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No. 10639

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALEXANDER CHASKIN, Doing Business as CHASKIN
CITRUS Co.,

Appellant,

vs.

HOWARD W. THOMPSON,

Appellee.

APPELLANT'S OPENING BRIEF.

Proceedings in the Court Below.

This action was filed by the plaintiff and appellant in the Superior Court of the State of California in and for the County of Los Angeles, against the defendant and appellee, to recover damages for interference with the appellant's business.

In his complaint the appellant alleged that he is a resident of Los Angeles County, engaged in the business of buying and selling, at wholesale, citrus fruits grown in the State of California; that in the course of such business he made and entered into contracts, agreements, and continuing business relations with packers of citrus fruit in California to supply and sell oranges to him, and with brokers in California to procure oranges for him, in order that he might resell the same to his customers at a profit,

and that on or about August 2, 1943, he had such contracts, agreements, and business relations with numerous packers and brokers of citrus fruit in California to sell to and procure for him packed boxes of oranges, and also had numerous orders from customers to purchase such oranges from him at prices which would have netted him a very substantial profit; that on or about said date, and every day thereafter, the appellee, also a resident of Los Angeles County, knowing of the existence of said contracts, agreements, and business relations, wrongfully, unlawfully, and intentionally solicited said packers and brokers to breach their said contracts and agreements with the appellant, and to terminate their said business relations with him, and wrongfully, unlawfully, and intentionally interfered with the appellant's said business, and with the appellant's rights under his said contracts, agreement and business relations [pp. 2-4*].

The complaint further alleged that the appellee called upon and communicated with said packers and brokers and sought to induce and coerce them to breach their then existing contractual and business relations with the appellant, by falsely, fraudulently and maliciously stating and representing to such packers and brokers that as an employee of the United States Department of Agriculture he had the lawful power and authority to cause them, and each of them, to suffer great loss, injury and damage by causing priorities for farming and packing equipment, machinery, and supplies to be withheld from and denied to them, and by causing their gasoline rations to be curtailed and restricted, and by causing suits and proceed-

*Page references throughout brief are to printed Transcript of Record.

ings to be brought against them for various penalties and forfeitures, whenever he chose so to do, and by stating, representing and threatening that he would exercise such pretended power and authority against them unless they breached their said contracts and agreements with the appellant and terminated their said business relations with him, and refrained from selling to the appellant or procuring for him any oranges whatever; that all of the foregoing was done by the appellee for the purpose and with the intention of preventing the appellant from obtaining supplies of oranges to fill his customers' orders, and of injuring and damaging the appellant and bringing about the failure and destruction of his business; that the appellee was successful in such efforts, and as the direct and proximate result thereof said packers and brokers cancelled and breached their contracts and agreements with the appellant, and refused to comply with or fulfill the same, and terminated and refused to enter into or continue business relations with the appellant, or to furnish to or procure for him further supplies of oranges; that the appellant was thereby prevented from purchasing or procuring approximately three hundred carloads of oranges which said packers and brokers had undertaken and agreed to sell to or procure for him, and which they would have sold to or procured for him, but for the said wrongful and unlawful interference on the part of the appellee; and that by reason thereof the appellant was unable to fill his customers' orders for said oranges, and lost said business and the profits which he would have derived and realized therefrom, and the good will attaching to his business was thereby injured and damaged, all to the appellant's damage in the sum of \$50,000.00 [pp. 4-6].

It was further alleged in said complaint that the appellee made said false and fraudulent statements, representations and threats, well knowing that he had no lawful right so to do, and well knowing that the appellant needed the oranges so contracted for to fill his customers' orders and to conduct and carry on his business; and that the appellee, nevertheless, wrongfully, fraudulently, and maliciously desiring and intending to interfere with and disrupt the appellant's business and destroy the same, and thereby to cause the appellant to suffer great loss, injury and damage, did all of the said acts and things, and pursued the said course of conduct, willfully, fraudulently, oppressively and maliciously, and with reckless disregard for the rights of the appellant; and the appellant, therefore, prayed for judgment against the appellee for \$50,000.00, actual damages, and \$150,000.00, exemplary and punitive damages [pp. 6, 7].

The appellee, by and through the United States Attorney at Los Angeles, then filed in the State Court a Notice of Motion and Petition for Removal, a Bond on Removal, and a Demurrer to the complaint [pp. 8-19].

In the Petition for Removal the appellee alleged that he was and is Field Representative of the Secretary of Agriculture of the United States of America, and Field Representative of the Fruit and Vegetable Branch of the Food Distribution Administration of the War Food Administration [pp. 9, 10]. As grounds for removal, the appellee in said petition alleged that the action is one arising under the laws and the Constitution of the United States of America, in that the appellee is an officer of the United States, and in all of the matters set forth in the complaint he was acting for and on behalf of the

United States, particularly requiring construction and interpretation of the First War Powers Act of 1941, and of the Agricultural Adjustment Act as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937, and also of Executive Order No. 9280, issued December 5, 1942 [pp. 10, 11]. The petition concluded with the prayer that the bond filed therewith be accepted, that the State Court make its order for the removal of the cause to the District Court of the United States for the Southern District of California, Central Division, pursuant to Title 28, United States Code, Sections 71 and 72, and cause the record therein to be removed to said District Court, and that no other or further proceedings be had in said cause in the State Court [p. 12].

The demurrer filed on behalf of the appellee alleged merely that the complaint does not state facts sufficient to constitute a cause of action [pp. 17-19].

The appellant then filed in the State Court his Answer and Objections to the Petition for Removal, denying, for lack of information and belief, the authority of the United States Attorney to appear for the appellee, and the appellee's alleged official capacity, and denying specifically that the action is one arising under the laws or the Constitution of the United States, or that the appellee was an officer of the United States acting for or on behalf of the United States in the matters set forth in the complaint, or that construction or interpretation of the statutes or the Executive Order referred to in the Petition for Removal is required. In his Answer the appellant further alleged that the Petition for Removal does not state facts sufficient to constitute grounds for removal, that the action is between two individuals, resi-

dents of the State of California, and is not brought against an officer of the United States, and is not one arising under the Constitution, laws or treaties of the United States, within the meaning of Section 28 of the Judicial Code of the United States, and is not a proper case for removal to the Federal Court, and that the Federal Court is without jurisdiction to entertain the action. The Answer prayed that the Petition for Removal be denied, and that the State Court retain jurisdiction of the cause [pp. 20-22].

Pursuant to the notice filed by the appellee, the Petition for Removal came on for hearing in the State Court, and was denied [pp. 22-23]. The appellee's demurrer likewise came on for hearing, and was overruled, and the appellee was given ten days to answer [p. 23].

The appellee, acting by and through the United States Attorney, then procured from the clerk of the State Court a certified copy of the record in that court, and filed the same in the United States District Court for the Southern District of California, Central Division [p. 24]. The appellee thereupon filed a petition in the Court below, setting forth the filing of his petition and bond for removal and the denial by the State Court of said petition, and the filing of the certified transcript of the record, and alleging that by stipulation of counsel the appellee's time to answer in the State Court had been extended beyond the ten days allowed by that Court, and that it is the purpose and intent of the appellant to prosecute said action in the State Court to final judgment. The petition prayed that an order be made and entered by the Court below staying all proceedings in the State Court until further order of the Court below [pp. 25-26].

Concurrently with the filing of said petition, the Court below issued an Order to Show Cause directed to the appellant, requiring him to appear and show cause why he should not be restrained and enjoined from prosecuting any further proceedings or taking any further steps in the State Court in said action [pp. 28-29].

Upon being served with said petition and order to show cause the appellant, appearing specially, served and filed a Notice of Motion to Remand, noticing the same for hearing at the time of the hearing on the order to show cause in the Court below. As grounds for the motion to remand, the appellant alleged that the Court below has no jurisdiction to hear and determine the cause, that it appears upon the face of the record that the cause is not one arising under the Constitution, laws or treaties of the United States, within the meaning of Section 28 of the Judicial Code of the United States, and is not one within the original jurisdiction of the Court below, and hence that said Court has no jurisdiction of the action or of the parties thereto under the attempted removal [pp. 30, 31].

The appellee's petition for a restraining order and the appellant's motion to remand were argued together in the Court below. No evidence whatever was introduced at the hearing. At the conclusion of the argument, the Court below made a minute order granting the appellee's petition, and denying the appellant's motion to remand [p. 36].

Thereafter, the Court below made and entered a formal order denying the appellant's motion to remand, without making any findings of fact or conclusions of law in connection therewith [p. 37].

Subsequently, findings of fact and conclusions of law were made and filed by the Court below on the appellee's petition for a restraining order. The Court found that the action was brought by the appellant against the appellee for damages and that both are residents of the City and County of Los Angeles, State of California, and set forth the prior proceedings [pp. 38, 39]. The findings then quoted paragraph VI of the appellant's complaint, being that portion of the complaint which specified the particular acts of the appellee of which complaint was made. As conclusions of law, the Court below concluded that it has jurisdiction over all the parties and the subject matter, and that the appellee is entitled to a permanent injunction restraining and enjoining the appellant, his agents and his attorney, from prosecuting any further proceedings or taking any steps in the State Court in said action [pp. 39-41].

The Court below then made and entered a decree of injunction, restraining and enjoining the appellant and his attorney from prosecuting any further proceedings or taking any steps in the State Court in said action, and a writ of injunction issued thereon [p. 42-46].

From the said minute order granting the petition of the appellee for an order staying proceedings in said action in the State Court, and from the said judgment or decree of injunction this appeal is taken [pp. 46, 47].

Statement of the Case.

This appeal presents no new question of law. It is the contention of the appellant that the action of the Court below simply constitutes a departure from well established precedent.

In support of his position the appellant contends, as he did in answering the appellee's petition for removal in the State Court and in moving the Court below to remand the cause, that as appears upon the face of the record, the action is one between two individuals, residents of the State of California, is not brought against an officer of the United States, and is not one arising under the Constitution, laws or treaties of the United States, within the meaning of Section 28 of the Judicial Code of the United States, and is not one within the original jurisdiction of the Federal Court; and, therefore, that the Court below being without jurisdiction over the action or the parties, the cause should have been remanded to the State Court; and, consequently, that the injunction of the Court below is void.

Specification of Errors.

The appellant in this appeal relies upon the following errors of the District Court:

1. The Court erred in holding that it has jurisdiction over the action or over the parties thereto.

2. The Court erred in making and entering the order and the judgment appealed from for the reason that it was without jurisdiction so to do.

3. The Court erred in making and entering the order and the judgment appealed from for the further reason that the evidence is insufficient to support and does not support the findings of fact, or the conclusions of law, or the order or judgment of said Court.

4. The Court erred in making and entering the order and the judgment appealed from for the further reason that the findings of fact do not support the conclusions of law or the order or judgment of said Court.

5. The Court below erred in making and entering the order and the judgment appealed from for the further reason that the conclusions of law do not support the order or judgment of said Court.

6. The Court below erred in denying appellant's motion to remand the cause to the Superior Court of the State of California in and for the County of Los Angeles.

Argument.

For convenience in presenting appellant's argument, Specifications Numbers 1 and 2 will be discussed together, Specifications Numbers 3, 4 and 5 will likewise be grouped, and Specification Number 6 will be discussed separately.

I.

The Court Below Lacks Jurisdiction Over the Action or the Parties Thereto, and Was Without Jurisdiction to Make the Order or the Judgment Appealed From.

It has long been the settled rule that the question whether or not a case is removable as one arising under the Constitution or laws of the United States is to be determined by the allegations of the plaintiff's complaint, and if the case does not thus appear to be removable it cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant.

28 U. S. C. A., Sec. 71, note 221;

Tennessee v. Union etc. Bank (1894), 152 U. S. 454;

Chappell v. Wentworth, 155 U. S. 102;

Mountain View M. & M. Co. v. McFadden, 180 U. S. 533;

Minnesota v. Northern Securities Co., 194 U. S. 48;

American Well Works Co. v. Layne etc. Co., 241 U. S. 257;

Great Northern R. Co. v. Alexander, 246 U. S. 276;

Great Northern R. Co. v. Galbreath Cattle Co., 271 U. S. 99;

Gully v. First National Bank (1936), 299 U. S. 109.

"The rule has frequently been laid down that to render an action removable to a federal court, under this section, it is necessary that it could have been originally brought in the federal court." (Emphasis supplied.)

28 U. S. C. A., Sec. 71, note 73 (citing many cases).

"The only ground of jurisdiction which is or can be suggested is that the suit was one arising under the Constitution and the laws of the United States. . . . It is the settled interpretation of these words, as used in this statute conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough, as the law now exists, that it appears that the defendant may find in the Constitution or laws of the United States some ground of defense. (Citing cases.) If the defendant has any such defense to the plaintiff's claim, it may be set up in the state courts and if properly set up, and denied by the highest court of the state, may ultimately be brought to this court for decision.

"It is well settled that the entry of a federal question into a case by way of defense, although it may present the controlling or the only disputed question, does not justify removal under section 28 of the Judicial Code."

In re Winn, 213 U. S. 458.

“We consider it well settled that a cause of action does not arise under federal laws so as to justify removal, unless the plaintiff’s right, to enforce which the suit is brought, arises out of and depends upon those laws, so that both in stating and in proving his case he must show that his right to recover stands upon the federal law; and that, even though his complaint may disclose that the case will turn upon and be ruled by the construction and effect given to some federal law under which the defendant is claiming, the federal jurisdiction will fail.” (Citing *Tenn. v. Union Bk.*, 152 U. S. 454, 459, 461, and other cases.)

Venner v. New York Central R. Co. (C. C. A. 6),
293 F. 373, 374.

In *Walker v. Collins*, 167 U. S. 57, an action was brought in a state court for damages for an unlawful seizure of plaintiff’s goods and chattels, and the answer of the defendants averred that during the times mentioned in the complaint the defendants were, respectively, a marshal of the United States and his deputies and that the seizure was under authority of an order of attachment issued out of the federal court. It was held that the case was not removable on the ground that it involved a federal question, as such question did not appear from the plaintiff’s pleading.

The rule has also been laid down that the fact that a defendant is an officer of the United States, and claims to have been acting under an Act of Congress in doing the acts complained of, does not authorize removal.

City of Stanfield v. Umatilla River Water Users Assn., 192 F. 596;

People’s U. S. Bank v. Goodwin, 160 F. 727;

4 *Op. Atty. Gen.* 300.

From the foregoing it is quite clear that in determining the removability of the case at bar any and all pleadings filed on behalf of the appellee must be disregarded, and the question determined solely from the allegations of the appellant's complaint. The only allegation upon which the appellee relies to support his position, and, indeed, the only allegation of the complaint which could by any stretch of the imagination be so construed, is paragraph VI, which reads as follows:

“That defendant called upon and communicated with said packers and brokers and sought to induce and coerce them to breach their then existing contractual and business relations with plaintiff, by falsely, fraudulently and maliciously stating and representing to such packers and brokers that as an employee of the United States Department of Agriculture he had the lawful power and authority to cause them, and each of them, to suffer great loss, injury and damage by causing priorities for farming and packing equipment, machinery, and supplies to be withheld from and denied to them, and by causing their gasoline rations to be curtailed and restricted, and by causing suits and proceedings to be brought against them for various penalties and forfeitures, whenever he chose so to do, and by stating representing and threatening that he would exercise such pretended power and authority against them unless they breached their said contracts and agreements with plaintiff, and terminated their said business relations with plaintiff, and refrained from selling to plaintiff or procuring for him any oranges whatever.”

The appellee seeks to construe these allegations to mean that he is being sued as a government official, acting in his official capacity, and, therefore, that the case arises under the laws of the United States. The United States Attorney even goes so far as to assert that "by federal law," the appellee "had the power to do each and every of the things alleged by the plaintiff as being false and fraudulent"! [p. 18].

Obviously, however, there is nothing in the language of paragraph VI of the complaint to indicate the existence of any federal question. Careful analysis of that paragraph shows that it is not even alleged that the appellee is in fact an employee of the government. On the contrary, the wording is susceptible of interpretation that the appellee's representation that he was an employee of the government was as false as his other statements. But even construing the allegation to mean that the appellee was actually an employee of the government, such allegation falls far short of a showing that the case arises under the Constitution or laws of the United States so as to warrant removal, as the authorities cited above plainly demonstrate.

It is apparent, therefore, that when the case is subjected to the tests required by an unbroken line of decisions, the fact that it is not removable is beyond question. It follows that the Court below was and is without jurisdiction to entertain the action, or to make the order or the judgment from which this appeal is taken.

II.

The Evidence, the Findings of Fact, and the Conclusions of Law Are Insufficient, in Any Event.

As has been stated, no evidence whatever was introduced in the Court below in support of the appellee's petition for a restraining order, or otherwise. It will be observed from the Transcript of Record that no evidence in the form of affidavits or other documents accompanied the petition, and that the only evidence before the Court was the certified record of the proceedings in the State Court.

The only evidence, then, to support the action taken by the Court below, if it can be called evidence, is the appellee's petition for removal filed in the State Court, and the only facts alleged in that petition were that the appellee is field representative of the Secretary of Agriculture of the United States of America, and field representative of the Fruit and Vegetable Branch of the Food Distribution Administration of the War Food Administration, an instrumentality and agency of the United States, engaged in the exercise of federal governmental duties and powers [p. 9]. The remainder of the allegations of the petition for removal were all conclusions of law. Among those conclusions of law we find the appellee's statement that in all of the matters set forth in the appellant's complaint he was acting for and on behalf of the United States [p. 10]. All of the material allegations of the petition for removal were controverted and denied by the appellant's answer.

Evidently recognizing the lack of any evidence upon which to base a finding of any specific fact which might

give rise to a federal question, the Court below in its findings of fact merely quoted paragraph VI of the appellant's complaint, and concluded as a matter of law that the Court has jurisdiction over the parties and the subject matter, and that the appellee is entitled to a *permanent* injunction [pp. 38-40], which, incidentally, he had not even requested.

It is submitted that the mere reading of the findings of fact shows conclusively that they do not support the conclusions of law, and that the order and the judgment for a permanent injunction are not supported by either the findings of fact or the conclusions of law.

III.

The Cause Should Now Be Remanded to the State Court.

When a State Court has denied removal and a defendant has filed a petition in the Federal Court to enjoin the plaintiff from proceeding further, a motion by the plaintiff to remand has been held to be the proper procedure.

Bley v. Travelers Insurance Co., 27 F. Supp. 351.

While an order denying a motion to remand may not be directly appealable, nevertheless the appellate court in reversing a judgment for an injunction restraining a party from proceeding further in the State Court will at the same time dispose of the entire controversy by ordering the cause remanded to the State Court. It was so held in *Schell v. Food Machinery Corp.* (C. C. A. 5), 87 F. (2d) 385 (cert. den., 300 U. S. 679).

In the case just cited, an appeal was taken from an interlocutory injunction under Judicial Code, Sec. 129, as amended. (28 U. S. C. A., Sec. 227.) The Court said:

"This cause was removed to the District Court from a state court on the ground that a separable controversy appeared between citizens of different states; a motion to remand was denied and several weeks later, the state court having vacated as improvident the order of removal granted by it, the District Judge enjoined Manatee River Bank & Trust Co., the original complainant, and Frank R. Schell and Rodney B. Harvey, who before removal had filed a joint answer and cross-bill, from acting further in the state court. The three named parties appeal from this interlocutory injunction under Judicial Code, Sec. 129, as amended. (28 U. S. C. A., Sec. 227.)

"We find it necessary to examine only the question of the jurisdiction of the District Court. If it has not jurisdiction of the cause it of course should not have granted the injunction. A federal court may sometimes enjoin proceedings in a state court to protect its own jurisdiction lawfully acquired, but may not interfere even temporarily when it has none. The state court's order of removal is not conclusive, but if wrongly entered could be, as it was, rescinded. (Citation.) The refusal of the District Court to remand is also not conclusive. The jurisdiction of the District Court comes only from the law and not from its own assertion of a judgment on it, nor from any action of the state court. The refusal to remand, if erroneous is reviewable by this court, ordinarily after final judgment, but also in connection with a reviewable interlocutory order. If the District Court has not jurisdiction, its activities ought at once to cease. In reviewing an interlocutory order under Judicial Code Sec. 129 a bill may be ordered dismissed if

without equity. *Smith v. Vulcan Iron Works*, 165 U. S. 518, 17 S. Ct. 407, 41 L. Ed. 810; *Meccano v. Wanamaker*, 253 U. S. 136, 40 S. Ct. 463, 64 L. Ed. 822. With much more reason when federal jurisdiction is lacking ought the appellate court so to declare. Judicial Code, Sec. 37 (28 U. S. C. A., Sec. 80) expressly says, if at any time it appears that a removed suit 'does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court . . . the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require.' The question of federal jurisdiction is ever present and self-asserting. The court must of its own motion and even against the consent or the protest of parties consider it. *Mansfield etc. R. Co. v. Swan*, 111 U. S. 379, 4 S. Ct. 510, 28 L. Ed. 462; *Morris v. Gilmer*, 129 U. S. 315, 9 S. Ct. 289, 32 L. Ed. 690; *International etc. R. Co. v. Hoyle* (C. C. A.), 149 F. 180."

* * * * *

"Aside from attacks that have been made on the removal because of a want of the statutory notice to the Trust Company and because of the failure in the petition to point out the separable controversy claimed to exist, we think no available ground of removal can be found, that the District Court acquired no jurisdiction, and that its injunction order is erroneous. The judgment is accordingly reversed, with direction to remand the cause to the state court."

It is submitted that the *Schell* case, in which certiorari was denied by the Supreme Court of the United States, is squarely in point, and is sufficient authority to justify this Court in ordering the present case remanded to the State Court.

Conclusion.

In accord with the foregoing, the appellant prays that the order and judgment appealed from be reversed, with direction to remand the cause to the Superior Court of the State of California in and for the County of Los Angeles.

Respectfully submitted,

G. V. WEIKERT,

Attorney for Appellant.

No. 10639.

IN THE

16

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALEXANDER CHASKIN, doing business as Chaskin Citrus
Co.,

Appellant,

vs.

HOWARD W. THOMPSON,

Appellee.

BRIEF OF APPELLEE.

CHARLES H. CARR,

United States Attorney;

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No. 10639.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALEXANDER CHASKIN, doing business as Chaskin Citrus
Co.,

Appellant,

vs.

HOWARD W. THOMPSON,

Appellee.

BRIEF OF APPELLEE.

Jurisdiction.

The decree of injunction of the District Court in the above case here on appeal was entered on the 1st day of November, 1943. The jurisdiction of this court rests upon Section 128 of the Judicial Code. 28 U. S. C. A. (1940 Ed.) 225.

Proceedings in the Court Below.

The appellee adopts appellant's statement of proceedings in the court below.

Statement of Facts.

So far as this appeal is concerned, the proceedings in the court below are adopted as a statement of facts.

Question Presented.

Whether a complaint which alleges that defendant, by fraudulently and maliciously stating and representing to packers and brokers of citrus fruit, had as an employee of the United States Department of Agriculture, the lawful power and authority to do or have done certain things which would adversely affect such packers and brokers, sets forth a case that arises under the Constitution or laws of the United States within the federal removal statute.

ARGUMENT.

I.

The Right to Transfer From a State Court to a Federal Court Is Present, if the Plaintiff's Right or Immunity Will Be Supported by One Construction of the Constitution or Laws of the United States and Defeated by Another Construction.

The Government takes no issue with appellant's contention that to bring a case within the removal statute, the right or immunity decreed by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. But it is the contention of the Government that if the complaint shows upon its face that a construction of the law of the United States is invoked which will, if given one construction, allow the plaintiff to prevail, but if given another will defeat the plaintiff, then such a case comes within the removal statute.

King County, Washington, v. Seattle School District No. 1, 263 U. S. 361, 68 L. Ed. 339;

First National Bank v. Williams, 252 U. S. 504, 64 L. Ed. 690;

Gully v. First National Bank, 299 U. S. 109, 81 L. Ed. 70.

While it may be true that the defendant herein is not sued in his official capacity so far as the specific words of the complaint are concerned, nevertheless it is obvious without argument that the action set forth in the complaint is one against the defendant under color of his official position because only by such color of title, at least, could the alleged false and fraudulent statements of the defendant have had any effect, and without such an allegation as to defendant's official position, it is doubtful that the complaint could set forth a cause of action over which even the state court would take jurisdiction.

II.

Plaintiff's Right Depends Upon a Construction of the Agricultural Adjustment Act, and the Regulations Duly Promulgated Pursuant to That Act, as Plaintiff's Cause of Action Against the Defendant Depends Wholly Upon What, if Any, Authority Defendant Had as an Official of the Department of Agriculture.

This court will take judicial notice of the laws of Congress attempting to regulate the marketing of citrus fruits in interstate commerce. This court will likewise take judicial notice of the fact that these laws are administered by employees of the Department of Agriculture.

It seems to follow, without argument, that a complaint which alleges that an individual representing himself to packers and brokers of citrus fruits as an employee of the United States Department of Agriculture, has certain lawful powers and authority to do or cause to be done certain things which would adversely affect them—then said cause of action is predicated upon the question of whether or not such a person is an employee of the Department of Agri-

culture—and, therefore, even if the allegations concerning his actions are true, or if such actions are outside the scope of defendant's authority as such employee, it is obvious that no laws, other than those which we denominate laws of the United States, can determine the question.

In the case of *Downey v. Geary-Wright Tobacco Company* (E. D., Ky., 1941), 39 F. Supp. 33, a tobacco grower, who had been delivering tobacco to a warehouse, brought an action on behalf of himself and all those other tobacco growers similarly situated in the state court against the warehouse for an accounting and declaratory judgment. The cause was removed from the state court to the United States District Court. Upon motion to remand, the District Judge denying the motion and overruling plaintiff's contention that his petition disclosed nothing more than a common law cause of action for money had and received and, therefore, the case should be remanded upon authority of *Louisville & National Railroad Company v. Mottley*, 211 U. S. 149, 53 L. Ed. 126; *Tennessee v. Union & Planters Bank*, 152 U. S. 454, 38 L. Ed. 511, said:

"The prayer of the petition is that 'an accounting be had with the defendant to ascertain the amount due to him on all tobacco sold on said date, the deductions made and the purpose for which the defendant intends to apply same, and that all sums of money withheld from the plaintiff and those persons for whom he sues be paid to said receiver to be held by him until the rights of this plaintiff and all patrons and tobacco growers can be ascertained. He prays judgment of this court that it be decreed that the defendant was without right to withhold any sums of money from the purchase price of his tobacco, and that it is the duty of the defendant to pay to him the 'said \$380.60 and interest thereon. He prays that this suit

be permitted to be prosecuted for the benefit of the plaintiff and all other persons similarly situated.'

"The Court has judicial knowledge of the fact that 'the marketing of tobacco constitutes one of the great basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce,' that the Congress of the United States has so declared by the Agricultural Adjustment Act of 1938, Sec. 311 of the Act, 7 U. S. C. A. §1311, and in order 'to promote, foster and maintain an orderly flow of this basic commodity in interstate and foreign commerce,' has 'found it necessary and appropriate' to regulate and control the marketing of it by authorizing the establishment of marketing quotas and prescribing penalties for the marketing thereof in excess of established quotas, by fixing and defining the rights and duties of producers, warehousemen and other persons engaging or participating in the marketing industry and by conferring upon the Secretary of Agriculture the authority to prescribe such rules and regulations as might be or become necessary for the enforcement of the Act. The Court must take judicial notice not only of the provisions of the Act itself but of all rules and regulations made and promulgated under its authority, for, 'wherever, by the express language of any act of congress, power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice.' *Caha v. United States*, 152 U. S. 211, 222, 14 S. Ct. 513, 517, 38 L. Ed. 415.

* * * * *

“The foregoing summary of the averments of the petition and the relief sought seems sufficient to show that the cause of action asserted extends beyond a mere common law action of assumpsit. The plaintiff invokes the jurisdiction of the Court on behalf of himself and all other persons similarly situated to secure a judgment declaring the rights and duties of the parties in respect to a transaction which so directly affects interstate commerce that, in the exercise of its constitutional powers, the Congress has seen fit to regulate it and to prescribe the rights and duties of parties participating in it. Agricultural Adjustment Act of 1938, 52 Stat. 45-48, 49, 7 U. S. C. A. §§1311-1322. The plaintiff thus makes the determination and declaration of the law of the United States governing the rights and duties of the parties an essential element of his case. He presents a claim and discloses a controversy of such a nature that it can only be correctly determined by a declaration of the law under and in the light of the Act of Congress and the regulations made pursuant thereto. This is disclosed upon the face of the complaint without anticipating defenses and unaided by the petition for removal. This differentiates the instant case from the cases upon which plaintiff relies.

“Obviously in rendering any judgment predicated upon the facts set out in the petition and in response to its prayer for a declaration of the rights and duties of the parties in respect to the transaction described, the federal question could not be avoided even if no answer were filed and no defense of any character made.

“As the Court takes judicial notice of the federal law involved, the omission of specific reference thereto in the pleading is immaterial. *Southern Pacific Co. v. Stewart*, 245 U. S. 359, 362, 38 S. Ct. 130, 62 L.

Ed. 345; *Hartford Fire Ins. Co. v. Kansas City, M. & O. Ry. Co.*, D. C., 251 F. 332. Neither is it material that the case may be ultimately decided upon some other issue. 'It should be borne in mind in this connection that jurisdiction depended upon the allegations of the bill, and not upon the facts as they subsequently turned out to be.' *City R. Co. v. Citizens' Ry. Co.*, 166 U. S. 557, 562, 17 S. Ct. 653, 655, 41 L. Ed. 1114.

"That the plaintiff does not rely upon 'any law regulating commerce' does not leave the suit beyond the reach of federal jurisdiction under Section 24(8) of the Jud. Code, 28 U. S. C. A. §41(8), if, as a matter of law, his case must stand or fall or its correct determination depend upon the effect or validity of applicable Congressional legislation enacted under the 'commerce clause' of the Constitution, art. I, §8, cl. 3. *Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & S. P. Ry. Co.*, 271 U. S. 259, 46 S. Ct. 530, 70 L. Ed. 934; *Mulford v. Smith*, 307 U. S. 38, 59 S. Ct. 648, 83 L. Ed. 1092.

"Looking to the nature of the plaintiff's case, confined to an orderly statement of facts essential to show him entitled to a declaratory judgment of the nature which he seeks, I am of the opinion that the suit is within the statutes conferring original jurisdiction upon the district courts of the United States and authorizing removal thereto, upon the ground that it is a suit arising under a law of the United States regulating commerce. See *Blease et al. v. Safety Transit Co.*, 4 Cir., 50 F. 2d 852; *Young & Jones v. Hiawatha Gin & Mfg. Co.*, D. C., 17 F. 2d 193, and the authorities cited therein.

"The plaintiff's motion to remand should be overruled."

While it is true that the above case is only a District Court case, nevertheless, we believe that it is a correct exposition of the law; and that the cases cited by Judge Ford—such as *Southern Pacific Company v. Stewart*, 245 U. S. 359, 62 L. Ed. 345, and *Caha v. United States*, 152 U. S. 211, 38 L. Ed. 415—amply sustain the District Court's decision, and more than amply sustain the contention of the Government in the instant case.

Not only will the court take judicial notice of the laws of Congress attempting to regulate the marketing of citrus fruits in interstate commerce, and that these laws are administered by employees of the Department of Agriculture, but it will also take judicial notice, having the power to do so, of the defendant's official capacity and even the extent of his authority and the scope of his duty. *Cooper v. O'Connor*, 99 F. (2d) 135, and cases cited therein; footnote, page 137.

Analysis of Plaintiff's Cases.

The appellant has cited numerous cases under his Point I, to which the Government takes no exception whatsoever. None of these cases hold the phraseology such as used in plaintiff's complaint fails to show on the face of the complaint that the case is one arising under the Constitution and laws of the United States. Rather, they are straight actions for damages against an individual without any reference to his official position; or else, they are cases in which the official position has been set out for the first time in the defendant's answer, such as in the case of *Walker v. Collins*, 167 U. S. 57, and the authority for that case, *Chappell v. Waterworth*, 155 U. S. 102.

We believe, therefore, that where, as in the present case and in the *Downey v. Geary-Wright Tobacco Company* case, *supra*, the court can take judicial notice that a law of the United States is involved merely by reading the plaintiff's complaint that the case is one, as held by Judge Ford, arising under the Constitution or laws of the United States.

Conclusion.

Wherefore, it is respectfully submitted that this appeal be dismissed and that the decree of injunction of the United States District Court herein be in all respects affirmed.

CHARLES H. CARR,
United States Attorney;
JAMES L. CRAWFORD and
WM. W. WORTHINGTON,
Assistant U. S. Attorneys,
By WM. W. WORTHINGTON,
Attorneys for Defendant.

No. 10639

IN THE

17
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALEXANDER CHASKIN, Doing Business as CHASKIN
CITRUS Co.,

Appellant,

vs.

HOWARD W. THOMPSON,

Appellee.

APPELLANT'S REPLY BRIEF.

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APR - 8 1944

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ALEXANDER CHASKIN, Doing Business as CHASKIN
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Appellant.

vs.

HOWARD W. THOMPSON,

Appellee.

APPELLANT'S REPLY BRIEF.

There is little in the appellee's brief that has not been fully answered in our opening brief. In substance, the appellee relies entirely upon the decision of the District Court for the Eastern District of Kentucky in the case of *Downey v. Geary-Wright Tobacco Company*, 39 F. Supp. 33. That case is readily distinguishable from the instant case, and the holding does not support the appellee's contention.

In the first place, removal in the *Downey* case was had, not upon the ground that it was one arising under the Constitution or laws of the United States, but that it was one arising under the law regulating commerce, original jurisdiction of which is conferred upon the District Courts of the United States by Section 24(8) of the

Judicial Code, 28 U. S. C. A. Sec. 41(8). As the District Judge said:

“The sole question is whether this is a suit which ‘arises under any law regulating commerce.’”

In the second place, the District Court in the *Downey* case points out that Congress has expressly declared that the marketing of tobacco constitutes one of the great basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce, and has therefore found it necessary and appropriate to regulate and control such marketing. The same cannot be said of oranges grown in the State of California, or elsewhere for that matter, concerning which Congress has made no similar declaration and has established no corresponding regulation or control.

Finally, in the *Downey* case the Court emphasized the fact that the plaintiff's complaint, for himself and on behalf of all other persons similarly situated, asked the Court to declare the rights and duties of the parties

“in respect to a transaction which so directly affects interstate commerce that, in the exercise of its constitutional powers, the Congress has seen fit to regulate it and to prescribe the rights and duties of parties participating in it. . . . *The plaintiff thus makes the determination and declaration of the law of the United States governing the rights and duties of the parties an essential element of his case.* He presents a claim and discloses a controversy of such a nature that it can only be correctly determined by a declaration of the law under and in the light of the Act of Congress and the regulations made pursuant thereto. *This is disclosed upon the face of the complaint without anticipating defenses and unaided by*

the petition for removal. . . . Obviously in rendering any judgment predicated upon the facts set out in the petition and in response to its prayer for a declaration of the rights and duties of the parties in respect to the transaction described, *the federal question could not be avoided even if no answer were filed and no defense of any character made.*" (Emphasis added.)

Thus, viewed in the light of the particular pleading presented to the Kentucky District Court, the decision in the *Dooney* case is in strict conformity with the authorities cited and relied upon by the appellant. To give that decision the broad and loose interpretation which the appellee seeks to place upon it would directly contravene those controlling authorities.

As for the rest of the appellee's brief, the only other point sought to be made is that judicial notice will be taken of the identity of employees of the government, and of the extent of their authority and the scope of their duty, and likewise of the laws of Congress "attempting to regulate the marketing of citrus fruits in interstate commerce," and of "the fact that these laws are administered by employees of the Department of Agriculture." In this connection, it is a curious fact that the appellee apparently loses sight of the fact that this is a suit between individuals, and repeatedly refers to the position and contentions of the government, as if the United States were a party to the action.

The cases on judicial notice go no farther than to authorize the courts to take judicial notice of the occupants of offices created by statute and the duties of which are so defined. To go beyond that would be

absurd when government employees are numbered in the millions and when the duties of so many of them are the subject of such widespread wonder and doubt. And even if the appellee were an employee of the government and the Court could take judicial notice of such employment in the absence of any allegation thereof in the complaint, that would not serve to make the case removable. As was said in the case of *Mountain View M. & M. Co. v. McFadden*, 180 U. S. 533, cited in our opening brief (p. 535):

“But the Circuit Court could not make plaintiffs’ case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading.”

Granted that judicial notice may be taken of the laws of Congress, we submit that there is no law of Congress “attempting to regulate the marketing of citrus fruits in interstate commerce.” We further point out that there is no reference in the complaint to interstate commerce, and nothing to indicate that the contracts and business relations with which the appellee is alleged unlawfully to have interfered extended beyond the borders of the State of California. And we confidently submit that there is no law or regulation of which judicial notice could be taken authorizing such conduct as that complained of, even on the part of a government employee.

A complete answer to the question of the removability of this case is to be found in the test prescribed by countless authorities, that to render an action removable it is necessary that it could have been originally brought in the Federal Court. As the Supreme Court stated in the

case of *In re Winn*, 213 U. S. 458, cited in our opening brief (p. 465):

“In substance, the allegations of the petition for removal are, that the defendant was subject to the Federal laws to regulate commerce, and that under those laws the defendant had a defense in whole or in part to the cause of action stated in the declaration. *But the cause of action itself is not based upon the interstate commerce law or upon any other law of the United States. The case could not have been brought originally in the Circuit Court of the United States, and was therefore not removable thereto.*” (Emphasis added.)

Application of that test to the complaint in the present case conclusively shows the complete absence of anything which would have conferred upon the District Court jurisdiction to entertain the suit in the first instance, and it therefore follows that the Court below could acquire no jurisdiction by removal.

In conclusion, we note that the appellee has made no attempt to answer Point II in our opening brief, namely, that the evidence, the findings of fact, and the conclusions of law do not support the order and judgment from which this appeal is taken. We believe that this point alone is sufficient to require a reversal; and for that reason, as well as for the other reasons presented, we submit that the order and judgment appealed from should be reversed, with direction to remand the cause to the State Court.

Respectfully submitted,

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